Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

STEAM PRESS HOLDINGS, INC., DBA YOUNG LAUNDRY AND DRY CLEANING, AND MICHAEL DRACE,
Petitioners,

v.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, AS AN INDIVIDUAL, DOE DEFENDANTS 1-150,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

During negotiations for a collective bargaining agreement, where Petitioners Young Laundry and Dry Cleaning and its President, Michael Drace ("Drace") (hereinafter collectively referred to "Employer" or "YLDC") were asking for economic concessions from Respondents Hawaii Teamsters and Allied Workers Local 996 ("hereinafter "Union") and its President, Mel Kahele (hereinafter "Union's President" or "Kahele"), Employer presented Union with economic data establishing Employer's dire financial condition. Union's President challenged Employer's veracity and told YLDC's employees that YLDC was making millions of dollars and was hiding that money in a secret corporation. After a federal mediator persuaded Union to have its CPA examine Employer's books, the CPA for Union confirmed to Union's President that Employer had no money and that its poverty plea was genuine. Union's President responded by terminating the services of the CPA, and with intentional disregard of the known truth, returned to YLDC's employees and again falsely told them that Employer was making millions of dollars and was hiding that money. It is undisputed that these knowingly false statements by Union's President were intentional and designed to foment a strike and damage Employer's reputation. As a direct result of the anger, hatred and distrust generated in Employer's employees by Union President's false statements, a seven-month strike ensued, causing substantial damage to Employer.

QUESTIONS PRESENTED

1. Whether the Ninth Circuit's opinion holding that quintessentially factual defamatory statements must be treated as protected opinions simply because they are made in the context of a labor dispute conflicts with

this Court's precedents in Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) and Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)?

2. Whether the Ninth Circuit's decision to extend the protection of Federal Labor Policy to statements made with constitutional malice also conflicts with decisions upheld in other circuits and with this Court's clear statements of Federal Labor Policy and prior decisions acknowledging the important social values which underlie the law of defamation?

3. Whether the Ninth Circuit committed reversible error by substituting judicial speculation that is not supported by the evidence of record for the trial court's record-based factual findings made after listening to eight days of testimony and having an opportunity to weigh the credibility and demeanor of witnesses testifying at trial?

RULE 29.6 STATEMENT

Petitioner Steam Press Holdings, Inc. has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Steam Press Holdings, Inc. dba Young Laundry and Dry Cleaning and Michael Drace ("Drace")(hereinafter sometimes collectively referred to as "YLDC" or "Employer"), respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals ("Ninth Circuit") in this case.

OPINIONS BELOW

1. Following a bench trial, Findings of Fact and Conclusions of Law, as corrected, were filed on October 29, 2001, unofficially reported at Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, No. 99-00187HG, 2001 WL 1715894 (D. Haw. Sept. 28, 2001), Appendix at p. 41a. [1] The Supplemental Order Regarding Damages, was filed on December 13, 2001 (unpublished) and is at Appendix p. 30a. The final Judgment of the District Court for the District of Hawaii ("District Court") entered January 2, 2002 is at Appendix p. 28a.

2. The opinion of the Court of Appeals for the Ninth Circuit ("Ninth Circuit" herein) is published at Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, 302 F.3d 998 (9th Cir. 2002), and is at Appendix p. 1a.

JURISDICTION

On August 26, 2002, the Ninth Circuit reversed the judgment of the District Court. Jurisdiction to hear this writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1)

[1] Reference to the appendix herein containing the lower court opinions is to "App." followed by "X" page numbers; Reference to Petitioner's Excerpts of Record before the court below is to "PER" followed by "X" page numbers.

(1993). The Ninth Circuit granted a motion to stay mandate on September 16, 2002.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. Amend. I.

The relevant provisions of the National Labor Relations Act ("NLRA") are as follows:

29 U.S.C. § 151 (1998) states in relevant part:

> Findings and declaration of policy
>
> . . .
>
> Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

29 U.S.C. § 171 (1998) states in relevant part:

> § 171. Declaration of purpose and policy
>
> It is the policy of the United States that –
>
> (a) sound and stable industrial peace and the advancement of the general welfare,

> health, and safety of the Nation and of the best interests of employers and employees can most

satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

29 U.S.C. § 173 (1998) states in relevant part:

> § 173. Functions of Service
>
> (a) Settlement of disputes through conciliation and mediation
>
> It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

29 U.S.C. § 174 (1998) states:

> § 174. Co-equal obligations of employees, their representatives, and management to minimize labor disputes
>
> (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall--
>
> (1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any

proposed change in the terms of such agreements;

(2)whenever a dispute arises over the terms or application of a collective- bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this chapter for the purpose of aiding in a settlement of the dispute.

STATEMENT OF THE CASE

A. The Facts

In 1998, YLDC, Honolulu's only unionized dry cleaner[2], lost a major government contract to a non-union competitor. Faced with labor costs higher than any of its competitors and the loss of 16% of its annual sales to a non-union competitor, it sought to negotiate a new labor agreement that would lower its labor costs.

[2] In place between YLDC and Union was the Master Laundry Agreement ("MLA"), originally executed by the parties in 1984 and which, by its own terms, automatically renewed, unless one of the parties served written notice of a desire to modify the MLA sixty days prior to the date of expiration of the agreement. (App. 45a-46a, ¶¶ 8, 9). The MLA contained a no-strike provision. (App. 85a-86a, ¶ 158)

During the course of negotiations with Union, which took place during July-October, 1998, YLDC repeatedly presented Hawaii Teamsters and Allied Workers Local 996 ("Union") and Union's President Mel Kahele ("Kahele") with graphic and verifiable evidence of the company's financial distress, including tax returns, audited financial statements and accurate charts so the workers could understand the truth (App. 51a, ¶ 29, App. 52a, ¶ 34, App. 53a, ¶ 37, App. 54a, ¶ 45, App. 61a, ¶ 71). For the undisputed purpose of precipitating a strike before the expiration of the MLA[3], on September 11, 1998 and again on September 29, 1998, moments before taking a strike vote, and knowing his statements were false, Kahele told YLDC's employees that YLDC and Drace were "making money" and "hiding money," in the range of "$7 to $10 million." (App. 72a, ¶ 124, App. 74a-75a, ¶ 129, App. 82a, ¶ 148, App. 83a, ¶ 151).

Not surprisingly, the employees were outraged and many employees reacted angrily to Kahele's false statements on Friday, September 11 that YLDC was making money, stating "Oh, that sucking Mike,"[4] and that Drace was a "son of a bitch". (App. 71a-72a, ¶ 122) (Tr. 1:59).

On the following Monday, September 13, Drace abruptly faced alienation from his formerly loyal and friendly workforce. On September 15, 1998, he wrote to Kahele in protest, suggesting the statements were defamatory. (PER 0332). On September 17, 1998, in a meeting at Union's offices, Drace asked Kahele to repeat to him what he had told YLDC employees. There, an emotional Kahele confirmed that he had told the employees of YLDC that Drace was hiding profits from YLDC in a secret corporation named

[3] By its terms, the MLA did not expire until October 31, 1998, due to the Union's failure to give timely notice of its non-renewal.

[4] "Sucking" and to "suck" are derogatory slang words.

Steam Press Holdings. (App. 72a-73a, ¶¶ 125-26, App. 74a-75a, ¶¶ 128-29). Concurrently, employees who were not at the September 11 meetings learned of the non-existent "hidden profits" through the company grapevine. (App. 78a, ¶ 139).

By September 25, 1998, Union was already seeking approval for strike benefits from the Teamsters Joint Counsel, its international organization. (App. 61a, ¶ 74). In an effort to avert a strike, YLDC requested the assistance of the Federal Mediator. (App. 61a, ¶ 73). The Federal Mediator took the following two steps to attempt to defuse the situation. First, he persuaded Union, who had repeatedly refused to review YLDC's financial reports, to have Union's CPA examine the books of YLDC to verify that YLDC's claims of financial hardship were genuine. (App. 61a, ¶ 75). Second, the Federal Mediator got the parties to agree that the majority of the non-economic provisions of the MLA, which had been modified four years earlier, were still in effect. (App. 48a-49a, ¶ 21).

On September 28, 1998, Kahele and the Union's CPA, Terry A. Takaki ("CPA"),[5] met with Drace and YLDC's bookkeeper, Unice Chang, at Drace's office. Takaki examined YLDC's corporate financial tax returns and audits and informed Kahele that YLDC had no money. In response, Kahele stated "[t]hat's not what I want to hear[.]" (App. 62a, ¶¶ 77-78, App. 63a, ¶ 84). CPA then indicated he felt that his arm was being twisted, and with that, CPA and Kahele left the meeting taking several YLDC financial records. (App. 62a, ¶ 80, App. 62a-63a, ¶¶ 82-85).

[5] The Union's "Certified Public Accountant."

While it is rare to have documentary proof of malice in a defamation case,[6] such proof is found here. Without informing YLDC, the Federal Mediator, or the employees that he was not going to complete the financial review, Kahele summarily terminated the services of CPA the following day, on September 29, 1998, several hours before Kahele was to appear at the YLDC's laundry plant to induce a strike vote. (App. 64a, ¶¶ 87, 88). CPA immediately confirmed his termination in a letter to the Union's lawyer, reciting in substance that the reason Kahele called off the project was because the YLDC employees were already so angry they would not consider the economic truth. (App. 64a, ¶ 87).

Kahele returned to the YLDC plant on September 29, knowing the employees were already infuriated, knowing that his statements were demonstrably false, and knowing CPA was off the project. Nevertheless, Kahele repeated the lies that YLDC had sales of $7 to $10 million (App. 74a-75a, ¶ 129), that YLDC and Drace were making and hiding money, (App. 82a, ¶ 149), and further falsely stated that the "Union was going to check on that." The enraged employees, who were never informed about either CPA's findings or the cancellation of his assignment, voted overwhelmingly to strike. (App. 64a, ¶¶ 88-89). Union's misrepresentations of fact to YLDC employees that YLDC had financially recovered and that Drace was hiding the profits from them in a separate company resulted in anger and distrust by YLDC's employees. (App. 75a-76a, ¶ 132).

As a direct result of the anger and distrust generated by the defamatory statements made by Kahele to YLDC employees about YLDC and Drace on September 11 and at

[6] Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1253 (9th Cir. 1997) (stating, "[a]s we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence").

the September 29 strike vote meeting, YLDC's employees voted to strike. (App. 84a, ¶ 153, App. 89a, ¶ 171-72). The strike and AFL-CIO coordinated boycott of YLDC, lasted from October 8, 1998 through May 5, 1999. (App. 66a, ¶¶ 97-98).

B. The Trial Court Decision

Following an eight day bench trial, Judge Helen Gillmor of the Federal District Court for the District of Hawaii concluded, in 71 carefully crafted pages of findings, that Union's statements were factual, and that they were knowingly false and made with actual malice. (App. 41a-124a). The District Court awarded YLDC $1,429,454.03 and Michael Drace $100,000.00 on the defamation claims, relying on Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966). (App. 115a, ¶¶ 18-20). The District Court denied YLDC's breach of contract claims, holding that the MLA had been "repudiated" by YLDC in a non-judicial exchange of correspondence between the parties. (App. 86a, ¶ 160).

C. The Ninth Circuit Appeal

On appeal, the Ninth Circuit Court reversed the defamation judgment, vacated the lower court's damage award and affirmed the denial of YLDC's contract and other claims. See Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, 302 F.3d 998, 1012 (9th Cir. 2002).

REASONS FOR GRANTING THE WRIT

The Petition for Writ of Certiorari should be granted for at least four reasons. First, the Ninth Circuit's opinion directly conflicts with, and seeks to nullify, this Court's opinion in Linn, 383 U.S. 53, which specifically recognizes the right to pursue state law defamation claims based on statements made in the labor dispute context. Second, the

Ninth Circuit Court's opinion below cannot be reconciled with this Court's holding in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), that clearly set a non-contextual standard for deciding whether a statement is defamatory. Third, the Ninth Circuit's interpretation of Federal Labor Policy with respect to defamation conflicts with an Illinois decision in the Sixth Circuit that this Court recently let stand allowing recovery for defamation on statements made on a picket sign that were much less egregious than the knowingly false statements made by Kahele. Finally, the Ninth Circuit's absolute privilege afforded to knowingly false statements made in the labor relations context repudiates this Court's prior decisions acknowledging the important societal values which underlie the law of defamation and of society's pervasive and strong interest in preventing and redressing the malicious lynching of one's reputation.

This case squarely raises what is likely to be a recurring and important issue in the law of defamation: Whether quintessentially factual defamatory statements can be treated as non-actionable opinions simply because they arise in a labor dispute or other controversial commercial context? The Ninth Circuit characterizes Kahele's statements as "a call to arms, not assertions of fact" only because of their labor dispute context. In holding that Kahele's statements are "fully protected by federal labor law," the Ninth Circuit eliminates any opportunity for defamed parties in a labor dispute to assert common law claims for damage to their reputation. The result of this holding is for the "context" to trump the "content" of the speech. Alternatively stated, the result creates an absolute privilege for knowingly false statements made in the labor relations context. This result is directly contrary to this Court's precedential holdings in Linn, 383 U.S. 53 and Milkovich, 497 U.S. 1.

I. The Ninth Circuit's Opinion Conflicts With This Court's Holdings In Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) and Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

The Ninth Circuit's decision to shield labor dispute participants from defamation liability simply because the statements were made in the context of a labor dispute and thus effectively providing an absolute privilege to a union's knowingly false statements leaves YLDC without the state law defamation remedy specifically crafted by this Court in Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53.[7] To relieve Union of liability, the Ninth Circuit engaged in a three-step process:

First, its de novo review gave protection to Kahele's statements on the basis that they were made in the context of collective bargaining. Thus, even though the Ninth Circuit recognized that Kahele's knowingly false statements of YLDC "making money" and "hiding money" employ plain unadorned language conveying objective fact, it concluded that the collective bargaining setting "suggests that the statements were a rhetorical device employed to further the Union's bargaining strategy[.]" Steam Press Holdings, Inc., 302 F.3d at 1006.

Second, without record support, the Ninth Circuit substituted the lower court's meticulous findings,[8] with pure

[7] Petitioner had no remedy under the National Labor Relations Act for these wrongs. See Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53, 63-64 (1966) (stating that the NLRB cannot award damages, impose a penalty or give any other relief to a defamed party).

[8] A District Judge lived with the bench trial for 8 days, compiled a record of 1570 transcript pages and over 200 exhibits, and found that statements regarding the financial practices, making and hiding money of an employer to be false and factual. The Ninth Circuit's gross disregard of the Trial

speculation of what "could have been said" or "what could have been meant" or understood by YLDC employees. The Ninth Circuit clearly substitutes speculation for fact when it states that Kahele's defamatory statements "may have been intended to communicate to those present that, regardless of YLDC's financial condition, the Union had to compel Drace to address their concerns . . . could have been a way of demanding that Union members . . . call Drace's bluff[.]" Id. at 1007 (emphases added). None of this speculation is based on a "totality of the circumstances" reflected in the record. The clear and undisputed evidence at trial provided a credited eyewitness account of the instant outrage of the employees that flowed directly from the September 11 statements that Drace was in fact making money, and was in fact hiding money in the millions of dollars while falsely claiming an inability to pay, (App. 70a-72a, ¶¶ 120, 122), and further Drace's credited account of Kahele's own admission of his September 11 statement (App. 72a-73a, ¶ 125).

Third, the Ninth Circuit applied the "totality of the circumstances test" to its redacted version of Kahele's statements. While acknowledging the words as "plain unadorned language" rather than loose figurative expressions, the Ninth Circuit concluded that the statements were "opinion not fact." Steam Press Holdings, Inc., 302 F.3d at 1007-09. By doing so the Ninth Circuit granted the Union an absolute privilege in making knowingly false statements thereby negating the state law defamation remedy that this Court specifically held in Linn is available to parties defamed in the context of a labor dispute. See Linn, 383 U.S. at 63-64.

Court's findings plainly requires supervisory correction. (App. 59a-60a, ¶¶ 63-69; App. 71a-72a, ¶ 122, App. 74a, ¶ 128, App. 75a, ¶ 130, App. 76a, ¶ 133, App. 78a, ¶ 139).

The Ninth Circuit decision stands for the proposition that in a labor dispute, the labor context always trumps the quintessential defamatory content of such statements because any audience in such a setting would, without proof, anticipate "epithets, fiery rhetoric, or hyperbole" rather than the plain truth. Steam Press Holdings, Inc., 302 F.3d at 1007 (quotation marks omitted). In effect, the Ninth Circuit held that employees voting on whether to strike have no expectation of honesty from the President of the Union.

To support its proposition that Kahele's audience of union members might have anticipated him to use rhetorical hyperbole instead of plain fact when addressing them, the Ninth Circuit cited to four non-labor cases: Leidholdt v. L.F.P. Inc., 860 F.2d 890 (9th Cir. 1988) (where the audience were readers of a Hustler Magazine article attacking a pornography opponent); Info. Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) (a non-labor defamation case (predating Milkovich by 10 years) about a statement in a trade publication made by legal counsel during the course of litigation between the parties); Underwager v. Channel 9 Australia, 69 F.3d 361 (9th Cir. 1995) (a non-labor case involving a documentary by 60 Minutes Australia that disputed the plaintiff's theories and credentials as an professional expert witness); Films of Distinction, Inc. v. Allegro Film Prods., Inc., 12 F.Supp.2d 1068 (C.D. Cal. 1998) (a non-labor case trade libel case involving a fictional Film that conveys the general message that watching the Crime Channel is bad for children and may cause them to become violent offender). None of these cases involved the willful use of a known lie during the course of labor relations. The Ninth Circuit left undisturbed the detailed finding of the District Court that Union's actions had intentionally caused the strike (App. 66a-68a, ¶¶ 97-108, App. 83a-84a, ¶¶ 152-53) and that Union acted with actual malice, i.e. in willful and

reckless disregard of the truth. (App. 80a-81a, ¶ 145). In short, it held that statements about a corporation's actual reported financial condition, while completely verifiable in virtually every other business context, are nevertheless mere "opinions" when spoken to employees by a union president striving to precipitate a strike.[9]

A. The Ninth Circuit's Opinion Conflicts With This Court's Holding In Linn And Creates An Absolute Privilege For Knowingly False Statements In The Labor Context

Linn, decided in 1966, preserves state law defamation claims arising in a labor dispute. To accommodate labor law but not pure First Amendment concerns, this Court limited the availability of state remedies for libel in a labor context to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused the complainant damage. See Linn, 383 U.S. at 55.

In Linn, this Court reversed a dismissal of a libel claim and held that the following statements in a union leaflet, circulated among employees during a union organizing drive, were actionable and apparently sufficient to meet the factual content test:

> (7) Now we find out that Pinkerton's has had a large volume of work in Saginaw they have had it for years.
>
> United Plant Guard Workers now has evidence
>
> A. That Pinkerton has 10 jobs in Saginaw, Michigan.
>
> B. Employing 52 men.

[9] Obviously, if a union president were trying to promote labor peace, he would not accuse the employer of hiding millions in profits when the employer was accurately making a plea of poverty at the bargaining table.

> C. Some of these jobs are 10 yrs. old!
>
> (8) Make you feel kind [sic] sick & foolish.
>
> (9) The men in Saginaw were deprived of their right to vote in three N. L. R. B. elections. Their names were not summitted (sic). These guards were voted into the Union in 1959! These Pinkerton guards were robbed of pay increases. The Pinkerton manegers (sic) were lying to us -- all the time the contract was in effect. No doubt the Saginaw men will file criminal charges. Somebody may go to Jail!

Id. at 56 (quotation marks omitted).

In doing so, this Court invoked the oft cited quotation from Garrison v. Louisiana, 379 U.S. 64, 75 (1964), reminding us that "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Linn, 383 U.S. at 67. Thus, this Court remarked as follows:

> [M]alicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.

Id. at 63.

In this case, the Ninth Circuit held that Kahele's statements "employ plain unadorned language" and not "the type of language that courts of this circuit have previously found to be loose and figurative." Steam Press Holdings, Inc., 302 F.3d at 1007. In other words, the Ninth Circuit

concluded the absence of loose, figurative, or rhetorical language in Kahele's statements. Id. Nonetheless, the Ninth Circuit leaps to the conclusion that Kahele's false statements were actually "a call to arms, not assertions of objective fact" because the "union meetings at which Kahele made his statements were 'circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole.'" Id. at 1007, 1009.

While leaving undisturbed the trial court's findings that the statements caused damage and were made with actual malice, Kahele's statements were granted the full protection of federal labor law due to the simple fact that they were made in the context of a labor dispute. As such, "context" alone completely repealed the protections of defamation law in the labor dispute, thus, dooming any Linn claim to failure precisely because it arises in a labor dispute.[10] This exercise in judicial hyperbole concludes a results-driven gutting of Linn that suggests that the Ninth Circuit's intent was to expand the absolute privilege it already accords defamatory statements made in a grievance context. See Hyles v. Mensing, 849 F.2d 1213, 1217 (9th Cir. 1988) (stating "[i]n the interest of protecting the CBA and its grievance procedures, we conclude that, as a matter of federal law, statements that are made in grievance proceedings established by a CBA . . . are privileged and may not support a state tort

[10] The practical elimination of viable defamation claims through the use of the "totality of the circumstances test" implicates certain policy considerations in this Court's recent decision in BE & K Const. Co. v. N.L.R.B., 122 S.Ct. 2390 (2002) (protecting access to the judicial system to redress civil injuries in labor contexts). Access to the courts will be of no avail, either to defamed employers or to unions, if otherwise factually supported judgments such as this can be swept aside by appellate judges simply because publication occurs in a labor dispute context.

[defamation] claim."). This is despite the fact that jurisdictions are split over whether an absolute or qualified privilege exists as to defamation in a grievance context, and no circuit has explicitly stated that this absolute privilege should be broadened to include any and all labor contexts. Compare Hull v. Central Transp., Inc., 628 F.Supp. 784, 789 (N.D. Ind. 1986) (creating an absolute privilege in part because defamation actions would "introduce an element of uncertainty into the grievance process as well as chill[] the advocacy of the positions of the parties.") with George v. Hilaire Farm Nursing Home, 622 F.Supp. 1349, 1355 (D.C.N.Y. 1985) (recognizing a qualified privilege for defamation). See, e.g., Gary D. Spivey, Annotation, Libel & Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement, 60 A.L.R.3d 1041 (1974). In order to prevent the repudiation of this Court's decision in Linn, the Ninth Circuit's decision must reversed.[11]

[11] Kahele's statements are as factual as the famous example provided by Judge Bork:

> The assertion that "Jones stole $100 from the church poor box last Friday night," cannot be tortured into an opinion, just as the assertion that "I think Jones is the kind of man who would steal from the church poor box" is obviously only a statement of the speaker's opinion of Jones' character.

Ollman v. Evans, 750 F.2d 970, 1008-09 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), cert. denied, 471 U.S. 1127 (1985).

B. The Decision Below Conflicts With Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) By Holding That The Non-Textual Context Of A Malicious Statement Overrides Textual Content.

In Milkovich, this Court sustained the actionability of a claim based on a sports page publication about a school wrestling coach's testimony at a public hearing. Rejecting the "opinion versus fact" analysis, this Court in Milkovich held that there is no constitutional distinction between fact and opinion and therefore, no "wholesale defamation exemption" for any statement that can be labeled "opinion." Milkovich, 497 U.S. at 18. This leads to the next issue in Milkovich, whether a statement is sufficiently factual to be susceptible of being true or false, regardless of its context. See id. at 21. Under this inquiry, if statements of opinion may "reasonably be interpreted as stating actual facts about an individual[,]" then the truthfulness of the factual assertions may be tested in a defamation action. Id. at 20 (brackets and quotation marks omitted). Milkovich not only ended "an artificial dichotomy between 'opinion' and fact[,]" Id. at 19, but set a non-contextual standard for deciding what is a "fact," namely whether the statement is sufficiently capable of being proven true or false rather than being loose figurative rhetorical hyperbole.

The Ninth Circuit held that because Kahele's plain unadorned factual statements, which were knowingly false, were made in a labor context, they became a "rhetorical device employed to further the Union's bargaining strategy, not statements of objective fact." Steam Press Holdings, Inc., at 1006-07. In other words, Kahele's otherwise quintessential false statements were held to be protected "opinion" solely due to the labor relations context of the statements. The Ninth Circuit's conclusion is based upon its speculation as to

what Kahele intended to communicate to the union members and further, that the union members may have anticipated that their Union President may use fiery rhetoric or hyperbole when speaking to them. See id. at 1007.

The Ninth Circuit's decision is plainly in conflict with this Court's decision in Milkovich and should be reversed.

C. The Ninth Circuit "Opinion - Not Fact" Analysis Clashes With Applications Of Milkovich In Other Circuits.

The Ninth Circuit apparently reads Milkovich to hold that a defendant publisher will prevail if there is speculative possibility that the audience may have considered the statement to be one of opinion, regardless of its factual content, and regardless of their actual perceptions.

As a rule of the law, this holding contrasts with several other circuits. The Fourth Circuit in Biospherics, Inc. v. Forbes, Inc., 151 F.3d 180 (4th Cir. 1998) interpreted Milkovich to place

> primary emphasis . . . on verifiability of the statement . . . . Milkovich directs that an opinion may constitute actionable defamation, but only if the opinion can be reasonably interpreted to declare or imply untrue facts.

Id. at 184 (quoting Milkovich, 497 U.S. at 20) (emphasis added, quotation mark omitted). In other words, the Fourth Circuit's rule is whether the words can be reasonably interpreted to declare or imply untrue facts. It is not whether an appellate judge can speculate what the speaker thought when he said the words.

Likewise, the Seventh Circuit finds actionable a statement based upon objectively verifiable facts as distinguishable from when a speaker plainly expresses "a

subjective view, an interpretation, a theory, a conjecture, or surmise[.]" Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). Since objectively verifiable facts are actionable, the Fourth and Seventh Circuit, in this case would likely conclude that a union president waiving a Dun & Bradstreet Report and claiming that the employer is making millions of dollars and hiding that money is actionable. The statements were, as this record amply establishes, objectively verifiable.

We submit the test for distinguishing between constitutionally protected and unprotected statements is whether the statement is factually verifiable and not whether it was made during a labor dispute.

II. The Ninth Circuit's Decision To Extend The Protection Of Federal Labor Policy To Statements Made With Constitutional Malice Also Conflicts With Decisions Upheld In Other Circuits And With This Court's Clear Statements Of Federal Labor Policy And Prior Decisions Acknowledging The Important Social Values Which Underlie The Law Of Defamation

A. The Ninth Circuit's Decision Conflicts With A Recent Decision That This Court Let Stand Interpreting Federal Labor Policy In The Sixth Circuit

This Court just recently denied a Union's Petition for Certiorari review filed on August 28, 2002 from a decision made by the Appellate Court of Illinois in Lowe Excavating Co. v. Int'l Union of Operating Eng'rs Local No. 150, 765 N.E.2d 21 (Ill.App.Ct. 2002). In Lowe, a construction company ("employer") brought an action against a union for injunctive relief and damages for, among other things,

defamatory statements made by a union while picketing a project the employer was working on.

The defamatory statements were published on the signs union members held at the picket site which read as follows:

> "NOTICE TO THE PUBLIC LOWE EXCAVATING DOES NOT PAY THE PREVAILING WAGES AND ECONOMIC BENEFITS FOR OPERATING ENGINEERS WHICH ARE STANDARD IN THIS AREA OUR DISPUTE CONCERNS ONLY SUBSTANDARD WAGES AND BENEFITS PAID BY THIS COMPANY LOCAL 150 International Union Of Operating Engineers, AFL-CIO"

Id. at 25.

The construction project being picketed by the union was a federal project that required all contractors, including Lowe, to pay prevailing wages and benefits. Even after the union became aware that Lowe was working on a federal project, it continued to picket using signs containing the above mentioned statements. Lowe was eventually removed from the project by the general contractor.

The trial court found in favor of the union on all counts and Lowe appealed the trial court's decision.

Unlike the Ninth Circuit, the Illinois Court in reversing the trial court in Lowe' defamation claim, did not allow the context of a federal labor dispute to trump the defamation analysis. Rather, the Lowe Court determined that the statements were clearly factual despite the fact that they were made in contentious labor circumstances. Furthermore, the Lowe Court also concluded that there was actual malice by the union in wording of the statements.

Here, the Ninth Circuit decision has created a context based preemption for defamation claims in the labor context that is contrary to this Court's prior decisions in Linn and its progeny and other courts in the Sixth Circuit. It is YLDC's contention that the Illinois Appellate Court applied the correct analysis and that the Ninth Circuit has got it wrong. This conflict can be resolved, and should be resolved, through certiorari review of this case as it is intolerable to allow the entire western United States to depart from the rest of the country in this important area of federal labor policy.

B. The Ninth Circuit's Extension Of The Protection Of Federal Labor Policy To Statements Made With Constitutional Malice Conflicts With This Court's Clear Statements Of Federal Labor Policy And Its Prior Decisions Acknowledging The Important Social Values Which Underlie The Law Of Defamation

The Ninth Circuit Court's holding that dishonesty "enjoys the full protection of federal labor law," clashes with the scheme of federal labor law designed to encourage the peaceful resolution of labor disputes through honest, good faith representation and rational bargaining. As such, the holding directly affects over 16 million American workers and thousands of employer units in all critical industries. See U.S. Bureau of Labor Statistics, Union Members in 2001 (visited Nov. 21, 2002) <ftp://146.142.4.23/pub/news.release/union2.txt>; Federal Mediation and Conciliation Service, 1998 Annual Report (visited Nov. 21, 2002) <http://www.fmcs.gov/annuals/98/intro.htm>. Because industries and customers are so impacted by strikes, Congress has long sought to protect the flow of interstate commerce from work stoppages through a variety of peace-promoting regulation under the Commerce power. See 29 U.S.C. § 151

(1998). The fundamental requirement of honesty in several aspects of such regulated behavior was, we had thought this Court made clear, so pervasive as to be beyond question. The Ninth Circuit, however, by expressly rewarding a union for knowingly concealing the truth from its members, has elevated repeated "willful dishonesty" to the status of a First Amendment right.

The following federal labor policies, all of which were ignored by the Ninth Circuit, will be frustrated if malicious defamatory speech is accorded a First Amendment protection:

C. The Duty Of Fair Representation.

As this Court has made clear, the duty of union leadership to its members is akin to the duty owed by other fiduciaries to their beneficiaries. Some members of this Court have analogized the duty a union owes to the employees it represents to the duty a trustee owes to trust beneficiaries. See Chauffers, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 567-68 (1990); Id. at 584-88 (Kennedy, J., dissenting). Others have likened the relationship between union and employee to that between attorney and client. See id. at 582 (Stevens, J., concurring in part and concurring in judgment). The fair representation duty also parallels the responsibilities of corporate officers and directors toward shareholders. "Just as these fiduciaries owe their beneficiaries a duty of care as well as a duty of loyalty, a union owes employees a duty to represent them adequately as well as honestly and in good faith." Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 75 (1991); see also Restatement (Second) of Trusts § 174 (1959) (trustee's duty of care); Strickland v. Washington, 466 U.S. 668, 686 (1984) (lawyer must render "adequate legal assistance"); Hanson Trust PLC v. ML SCM Acquisition Inc., 781 F.2d 264, 274 (2nd Cir. 1986) (directors owe duty of care as well as loyalty). When

Kahele inflamed the anger of YLDC's employees to put their jobs on the line, he concealed from them not only the fact that their employer genuinely could not afford their wage demands, but also that Union's CPA had already confirmed YLDC had "no money," and for that candor CPA had been terminated. The Ninth Circuit's holding stands the principle of fiduciary duty on its head and condones what federal law prohibits. It provides rather a model for cowardly, dishonest union "leadership."

D. Union Members' Right To Meaningful Participation In Union Affairs.

The Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C.§§ 401 (1998) et seq., gives union members a right to participate "meaningfully" in the affairs of their union. To ensure that this right is real, the duty to refrain from willfully dishonest actions toward employees applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." Communications Workers v. Beck, 487 U.S. 735, 743 (1988) (internal citation omitted). Additionally, a union's material nondisclosure plays a significant role in holding that the duty of fair representation has been breached. See Minnis v. UAW, 531 F.2d 850, 854 (8th Cir. 1975) (union's failure to inform grievant that it postponed his grievance is breach of duty of fair representation); Alicea v. Suffield Poultry, Inc., 902 F.2d 125, 130 (1st Cir. 1990) (holding a union responsible for serious misrepresentations that lack rational justification or are improperly motivated is consistent with the union's obligation to deal honestly and fairly with its members); Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14, 453 F.2d 1018, 1024 (9th Cir. 1972) (to accord meaningful participation, union must communicate in language of employees.).

The Ninth Circuit's condonation of Kahele's speeches rests on the cynical and legally baseless view that employees neither expect nor deserve the truth when voting to strike. This is contrary to federal labor policy.

E. Rational Bargaining.

Federal law promotes the peaceful mediation and conciliation of labor disputes by an authorized Federal Mediator. See 29 U.S.C. §§ 171, 173, 174 (1998).

Under the National Labor Relations Act, an honest exchange of economic data is required to facilitate good faith bargaining and promote labor peace. As this Court observed in N.L.R.B. v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956), Section 204 (a)(1) of the Act admonishes both employers and employees to "exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions . . . ." Part of the effort to reach that agreement is to treat an employer's claim of financial inability to pay increased wages as a fact. "The ability of an employer to increase wages without injury to his business is a commonly considered factor in wage negotiations. Claims for increased wages have sometimes been abandoned because of an employer's unsatisfactory business condition; employees have even voted to accept wage decreases because of such conditions." Id. (footnote omitted).

By reducing the honest exchange of financial information to a "call to arms" rather than assertions of objective fact, the federal scheme of rational bargaining is not merely frustrated - it converts the honest path to peace prescribed by Congress to a road to economic warfare.

This court is urged to take this opportunity to assure that the First Amendment is not so perverted as to provide absolute protection to what the District Court found to be knowing dishonesty by Union to its own members. Such a

result is a significant and entirely inexplicable affront to the principles of honesty heretofore required in such a context by this Court and Congress.

F. Society Has Little Interest In Extending The Outer Limits Of First Amendment Protection To False Commercial Speech In The Context Of A Labor Dispute

In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), this Court, while extending First Amendment protections to commercial speech, held that deceptive or misleading commercial speech may be regulated in order to insure that "the stream of commercial information flow[s] cleanly as well as freely." Id. at 772. This is because "[u]ntruthful speech commercial or otherwise, has never been protected for its own sake. Id. at 771. By analogy, federal labor policy does promote the dissemination of accurate, as opposed to misleading, information to employees as they make economic decisions of whether to place their jobs and the viability of an employer on the front lines of an economic war. In fact, a number of restrictions upon speech in a labor context. For example, in N.R.L.B. v. Gissel Packing Co., this Court held that an employer's threats of retaliation for the labor actions of his employees are "without the protection of the First Amendment." 395 U.S. 575, 618 (1969).

Here, the Ninth Circuit wrongly approves of a union president who goes from meeting to meeting fomenting a strike, not peddling ideology. However, it is beyond cavil that society has as much of an interest in curtailing such willful dishonesty as it does in prohibiting fighting words "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social

interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Congress and this Court have thus repeatedly affirmed that federal labor policy may and does restrict what a Union may say to employees. However, this Court has also held that Congress has left to the states the use of tortious words in communications relating to strike. See Belknap, Inc. v. Hale, 463 U.S. 491, 509-12 (1983). Given the policy of Linn, there is no rational basis to allow unions to induce strikes with tortious speech while depriving employees of the collateral opportunity to use lies to break a strike.

Congress, this Court, and state tort laws have limited the range of permissible communications of information in labor disputes even though these regulations may constitutionally impinge on the outer limits of free speech. Here, the Ninth Circuit stands at the extreme other end of the spectrum and declares "It's a Union causing a strike – so they can damage a reputation knowingly, maliciously, and freely."

III. The Court Of Appeals' Gross Disregard Of The Trial Court's Findings Of Fact And Substitution Of Judicial Speculation Warrants The Exercise Of This Court's Supervisory Authority.

This Court's "supervisory power over the judgments of the lower federal courts is a broad one." United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950); Walling v. James V. Reuter, Inc., 321 U.S. 671, 676 (1944) (vacating and remanding a case regarding a violation of the Fair Labor Standards Act based in part on the supervisory authority of the Court).

In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), this court stated:

> [t]he conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court. Particularly is this so where a decision here for review cannot escape broadly social judgments -- judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.

Id. at 501 n.16 (citation omitted).

This rule is critical in defamation matters. In Bose Corp., 466 U.S. 485, this Court determined that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Id. at 499 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964) (emphasis added)). Here, the Ninth Circuit skipped the "examination of the

whole record" to make sure the judgment would not compensate the victim of malicious falsehoods.

For the reasons stated above, the Ninth Circuit's substitution of judicial speculation of what a witness "could have" thought or stated converts objective fact findings supported in a record into subjective opinions and is clear error that requires correction by this Court.

IV. This Is A Case That Implicates Broad Social Judgments Concerning The Whole Nature Of The Duty Of Honesty In A Civilized Society.

We deal here not merely with a small business and a strike. At the center of this case is the role of honesty in our lives as Americans. It arises concurrently with the Enron and related scandals, with the AFL-CIO's call to investors to not tolerate companies that overcompensate executives, cheat their employees, lie to their shareholders, or cook their books, to hold CEO's accountable and to insist upon higher standards of corporate behavior. John J. Sweeney, Remarks by John J. Sweeney, President of the AFL-CIO On the Wall Street Rally (visited Nov. 21, 2002) <http://www.aflcio.org/publ/speech2002/sp0730.htm>.

In direct contrast to the Enrons and WorldComs doing business in the United States, YLDC is an employer who told the truth to its employees and Union and who violated no labor laws in its struggle to survive as the only unionized highest labor cost employer in its market. When YLDC prevailed at trial, providing clear documentary and testimonial proof that the statements of Kahele were false and made with actual malice, and further proving the damages caused by the malicious defamation, YLDC believed the Linn case really meant that the willful use of the known lie has no constitutional protection in any context. Linn, 383 U.S. at 62-63.

YLDC now has a decision from the Ninth Circuit telling it that the decision in Linn does not mean what it says. The Ninth Circuit's decision allows Union to escape liability for knowingly lying to its members because the lies were made during the course of a labor dispute where its members could have thought the lies about facts were only about opinions. See Steam Press Holdings, Inc., 302 F.3d at 1005-07, 1009.

This court is the ultimate supervisor of the federal judiciary. It must once again tell America in plain terms that can be universally understood, whether willful dishonesty that is injurious to reputation is or is not constitutionally protected in any context. If certiorari is denied in this case, this Court may implicitly confirm that "bearing false witness" so long as it occurs in the context of a labor dispute is now, an accepted, indeed constitutionally protected, value in our society, enshrined in our First Amendment.

By granting certiorari, this court can eventually confirm that the nature of our Government and the duties and immunities of citizenship involving honesty are not so situational. This Court can say that honesty is a paramount value and that the Framers of the Constitution never intended that the First Amendment would repeal the Ninth Commandment: "Thou shalt not bear false witness against thy neighbor!" (Exodus 20:13); (Shemos 20:16).

CONCLUSION

One century ago, the first Justice Harlan admonished this Court that the Constitution "neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.

In Linn, we were reminded there is no protection in our society for the willful use of the "known lie," by any group or class be it labor or management, and it is important to reverse the erosion of this standard by the Ninth Circuit.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-17222, No. 02-15097

[Filed August 26, 2002]

STEAM PRESS HOLDINGS, INC., dba Young Laundry and Dry Cleaning; MICHAEL DRACE, *Plaintiffs-Appellees*,	)
v.	)
HAWAII TEAMSTERS AND ALLIED WORKERS UNION, LOCAL 996; MEL KAHELE, as an individual, *Defendants-Appellants*.	)
STEAM PRESS HOLDINGS, INC., dba Young Laundry and Dry Cleaning; MICHAEL DRACE, *Plaintiffs-Appellants*,	)
v.	)
HAWAII TEAMSTERS AND ALLIED WORKERS UNION, LOCAL 996, *Defendant-Appellee* and MEL KAHELE, as an individual; HAWAII TEAMSTERS HEALTH & WELFARE TRUST FUND; DOE DEFENDANTS 1-150,	)

Defendants.)
)

Appeal from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding
D.C. No. v. CV-99-00187-HG(KSC).
D.C. No. CV-99-00187-HG.

JUDGES:
Before: Alfred T. Goodwin, Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges. Opinion by Judge Goodwin.

OPINION

GOODWIN, Circuit Judge:

Michael Drace and Steam Press Holdings, Inc., dba Young Laundry and Dry Cleaning, sued Mel Kahele and Hawaii Teamsters and Allied Workers, Local 996, in federal district court alleging that (1) defendants made defamatory statements of and concerning plaintiffs during the course of a labor dispute; (2) defendants breached a no-strike clause in a collective bargaining agreement ("CBA"); and (3) defendants engaged in racketeering. The district court found in favor of plaintiffs on the defamation claim, awarding damages for economic and reputational harm caused by the defamatory statements, and found in favor of defendants on the remaining claims. Both parties appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons that follow, we (1) reverse the district court's

holding on the defamation issue; (2) affirm the district court's disposition of the RICO and breach of collective bargaining agreement issues; and (3) affirm the district court's denial of plaintiffs' request for attorneys' fees.

BACKGROUND

This appeal arises out of a labor dispute involving the employees of Young Laundry and Dry Cleaning, Inc. ("YLDC"), a retail laundry and dry cleaning business operating in Hawaii. In September 1994, Michael Drace purchased YLDC from its prior owner, David Applebaum. Drace has been the president and owner of YLDC since the time of the purchase.[1]

Hawaii Teamsters and Allied Workers, Local 996, (the "Union") is a labor organization, as defined in 29 U.S.C. § 152(5). Mel Kahele was president of the Union at all times relevant to these proceedings. As of July 1998, the Union had approximately 5400 members and was a party to collective bargaining agreements with approximately 68 employers, one of whom was YLDC.

At the time of Drace's purchase of YLDC, the Union and YLDC were parties to a collective bargaining agreement (known as the Master Laundry Agreement ("MLA")) which governed the YLDC employees' wages, benefits, and working conditions. As a condition of Drace's purchase of YLDC, the Union was asked to make certain concessions on employee wages and benefits. The Union agreed to these concessions,

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[1] Drace and YLDC are collectively referred to as the "Employers."

and the concessions became part of the Memorandum of Agreement ("MOA"), which modified the terms of the MLA. YLDC's employees understood the concessions as a loan that would be repaid to them by Drace upon the expiration of the MOA. By its express terms, the MOA remained in effect until September 30, 1998.

Shortly before the expiration of the MOA, the Union and the Employers entered into negotiations on a new contract. In a letter dated July 13, 1998, the Union proposed restoration of the benefits that had been reduced or eliminated when Drace purchased YLDC in 1994. In response, Drace claimed that YLDC was in financial trouble and proposed further reductions in employee benefits and wages. Drace also invited the Union to arrange for an accountant to review YLDC's books.

On July 28, 1998, the Union informed Drace that it was conducting its own research into YLDC's finances and that it would organize a negotiating committee. The Union asked the International Brotherhood of Teamsters to provide it with financial information regarding YLDC.

On September 2, Union representatives met with Drace and others to discuss YLDC's proposals. Drace, employing various charts and graphs, explained to the Union representatives that YLDC was in financial distress. One Union member reacted by telling Drace that charts can be "made to show anything that [one] wants them to show." After Drace's presentation, the Union again proposed the restoration of the benefits that had been conceded in 1994, along with wage increases for each of the following three years. The meeting ended without an agreement.

On or around September 8, the Teamsters responded to the Union's request for financial information about YLDC by sending the Union a Dun & Bradstreet Report ("D&B Report") on YLDC. The district court found that the D&B Report and supporting documents "contain[ed] numerous indications of YLDC's poor financial health."

The parties held their second bargaining session on September 10. Drace presented his third proposal (which was substantially similar to his earlier proposals). During this meeting, Union representatives inquired about a company called "Steam Press, Inc." Although Drace had formed Steam Press in 1995 as a holding company for YLDC, Union members had only recently discovered the company's existence. Kahele asked Drace what Steam Press was, and Drace replied that it was a company set up to invest the profits of YLDC. The Union's questions concerning Steam Press prompted Mr. Jossem, YLDC's attorney, to ask if the Union was calling Drace a liar. Union member Jesse Apodaca Torres responded "we can," to which Kahele added "we will." The Union ultimately rejected Drace's proposal.

On the following day, near a dumpster outside the YLDC plant, the Union held a meeting to discuss the status of contract negotiations with YLDC employees. The number of employees present changed over the course of the meeting, ranging from a low of forty to a high of eighty.

Hannah Kilakalua, a YLDC employee, attended this meeting and later testified that Kahele stated at the meeting "Mike is making money" and "Mike Drace is making money from the Steam Press." Kilakalua further testified that

"everybody was mad" after Kahele made the statement "Mike is making money."

Drace, although not present at the meeting, testified that after the meeting he spoke with Bernard Roque, a member of the Union negotiating team. Roque told Drace that he was at the meeting and that he resigned from the negotiating team after hearing that YLDC was hiding seven to ten million dollars. The district court found "that Kahele stated at the September 11 meeting that Mike Drace was making money and that he was hiding the money in Steam Press."

On September 17, a third negotiation session took place, resulting in the parties agreeing that they were at an impasse. On September 25, the Union agreed to have its accountant examine YLDC's books. Kahele accompanied Union accountant Terry Takaki to YLDC's offices where they reviewed the consolidated books and records of YLDC and Steam Press. After examining these materials, Takaki informed Kahele that YLDC did not have any money. Shortly thereafter, Kahele and Takaki put the review of YLDC's financial records on hold.

The Union held a strike authorization vote on September 29. YLDC employees voted 80-8 in favor of a strike. Relying on the testimony of Kilakalua, the district court found that "At the strike vote, Kahele, as well as others, made statements that Drace was making money from Steam Press and that the Union was going to check on that." On October 8, the Union went on strike. The strike lasted until May 1999, when YLDC's employees decertified the Union.

Shortly before the strike ended, Drace and YLDC sued the Union and Kahele in federal district court, alleging, *inter alia*, that (1) the strike violated a no-strike clause in the collective bargaining agreement; (2) the Union was guilty of defamation; and (3) Kahele and others had engaged in racketeering in violation of 18 U.S.C. § 1961.

The district court disposed of the Employers' racketeering claim at the summary judgment stage, granting the Union's motion for summary judgment. The court found that the Employers had failed to demonstrate either "closed-ended" or "open-ended" continuity, and therefore held that the Union had not engaged in a "pattern" of racketeering activity, as required by 18 U.S.C. § 1961.

The court disposed of the Employers' remaining claims following a bench trial. Pursuant to section 301 of the Labor Management Relations Act, the Employers alleged that the Union breached the no-strike clause of the MLA. Specifically, the Employers alleged that the October 8 strike was a breach of Section 29 of the MLA, which prohibited strikes while the agreement was in force.[2]

The district court found that the MLA, by its express terms, still governed the parties at the time of the strike. The court also found, however, that the Employers were

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[2] Section 29 of the MLA provides: "The parties hereto agree that during the term of this agreement there shall be no lockout by the Employer, nor any strike, sitdown, refusal to work, stoppage of work, slowdown, retardation of production, or picketing of the Employer on the part of the Union or its representatives or on the part of any employee covered by the terms of this agreement."

"estopped from arguing that the MLA continued to be in force because they had repudiated it prior to the beginning of the strike on October 8, 1998." Accordingly, the court entered judgment in favor of the Union.

Lastly, with respect to the state law defamation claim, the court found in favor of the Employers. The court found that Kahele's statements that "Drace was making money" and "hiding it in Steam Press" were false, and that Kahele made them with reckless disregard for their truth.

The district court awarded both Drace and YLDC damages for injuries that it found were caused by Kahele's defamatory statements. The court awarded Drace $ 50,000 to compensate him for injury to his reputation, and $ 50,000 to compensate him for emotional distress. Additionally, finding that Kahele's defamatory statements caused the employee strike, the court awarded YLDC approximately one million dollars in damages "flowing from the strike." The damages award to YLDC was based on a number of factors, including YLDC's loss of productivity as a result of the strike; lost profit on retail and commercial sales as a result of the strike; and direct expenses resulting from the strike (e.g., hiring security guards to protect against damage to YLDC's facilities). The court also awarded YLDC damages for harm to its reputation "[a]s a result of the defamatory statements and the resulting strike of YLDC employees." This appeal followed.

DISCUSSION

I. The Union's Appeal

The Union challenges the district court's defamation judgment and award of damages to the Employers. In particular, the Union contends that Kahele's statements that Drace "is making money" and "hiding money in Steam Press" are not defamatory. The Union also contends that Kahele's statements are not "of and concerning" plaintiff YLDC, and that the statements were not made with "actual malice."

[1] Defamation claims predicated on statements or publications made in the context of a labor dispute are governed by *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1996). In *Linn*, an employer brought a state law libel action against a labor union alleging that the union had libeled the employer during the course of a labor organization campaign. The Court, finding that the National Labor Relations Act ["NLRA"] did not entirely preempt state law libel actions predicated on libels made during the course of labor disputes, held that such actions are permissible so long as "[a] complainant can show that the defamatory statements were circulated with malice and caused him damage." *Id.* at 64-65; *see also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974) ("[In *Linn*] we held that libel actions under state law were pre-empted by the federal labor laws to the extent that the State sought to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or with reckless disregard for the truth.").

[2] Thus, under *Linn* and its progeny, a complainant pursuing a state-law defamation action predicated on a statement made during the course of a labor dispute must prove (1) that the allegedly defamatory statement asserts a fact or "impl[ies] an assertion of objective fact," *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990); *see also Linn*, 383 U.S. at 58 n.2; *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990); (2) that the factual assertion is false, *Milkovich*, 497 U.S. at 16; *Letter Carriers*, 418 U.S. at 283-84; *Unelko*, 912 F.2d at 1055-56; and (3) that the speaker published the challenged statement with "actual malice." *Letter Carriers*, 418 U.S. at 281; *Linn*, 383 U.S. at 64-65; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). The First Amendment further requires that the challenged statement be "of and concerning" the complainant. *Sullivan*, 376 U.S. at 288, 292.

Here, the district court explicitly found that Kahele's statements were false.[3] The district court implicitly found (1) that Kahele's statements implied assertions of objective fact, and (2) that Kahele's statements were of and concerning plaintiffs Drace and YLDC. The court also found that Kahele made the statements with reckless disregard for their truth, and therefore that the actual malice standard was satisfied.

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[3] The parties do not dispute the fact that YLDC was experiencing financial difficulties during and prior to the labor dispute. However, the parties vigorously dispute whether Kahele knew or had reason to believe, at the time the challenged statements were made, that YLDC was experiencing financial difficulties.

A. Defamatory meaning.

The Union begins its attack on the district court's judgment by arguing that Kahele's statements do not imply assertions of objective fact.[4] According to the Union, the application of this circuit's "totality of the circumstances" test to the challenged statements reveals that the statements are "rhetorical hyperbole or opinion" incapable of being proved true or false. The Union maintains that, because the challenged statements do not possess a defamatory meaning, they are not actionable and therefore the district court erred in reaching the issue of actual malice.

In response, the Employers ask that we decline to reach the merits of the Union's argument because it is being raised for the first time on appeal. Although as a general rule courts of this circuit will not consider arguments on appeal that were not properly raised at the lower court level, *see, e.g., In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989), the Employers confuse the making of legitimate legal arguments about existing issues with the impermissible introduction of new legal theories or defenses. The Union's

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[4] The Union suggests that there was insufficient evidence to warrant the district court's finding that Kahele said that "Drace *is hiding* money in Steam Press." The Union correctly points out that, in her testimony, Hannah Kilakalua did not explicitly state that Kahele spoke the words "Drace is hiding money." Nevertheless, a reasonable finder of fact could have understood from Kilakalua's testimony as well as other evidence in the record that Kahele said that Drace was hiding money. We need not, however, resolve this issue because, as discussed *infra*, we conclude that the challenged statements are not defamatory.

argument arises out of the Employers' claim of defamation, and was ruled on (at least implicitly) by the district court. Thus, we consider the Union's argument in its entirety.

Turning to the merits, we must determine whether a reasonable factfinder could conclude that Kahele's statements imply an assertion of objective fact. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); *see also Gilbrook v. City of Westminster*, 177 F.3d 839, 861-62 (9th Cir. 1999) ("[A] court reviewing a defamation claim must ask a threshold question: Could a reasonable factfinder conclude that the contested statement implies an assertion of objective fact?"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195 (8th Cir. 1994) ("The presence of a false statement of fact is a *sine qua non* for the maintenance of state defamation action in the labor field."). A district court's determination of whether an allegedly defamatory statement implies an assertion of objective fact is a question of law which we review de novo. *Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987); *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980).

[3] In *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), this circuit set forth the following test to guide the inquiry into whether an allegedly defamatory statement implies an assertion of objective fact:

> To determine whether a statement implies a factual assertion, we examine the totality of the circumstances in which it was made. First, we look at the statement in its broad context, which includes the general tenor of the entire

> work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

Id., at 366; *see also Rooney*, 912 F.2d at 1053; *Partington*, 56 F.3d at 1153. If Kahele's statements do not imply assertions of objective fact, then the statements are protected under federal labor law. *Letter Carriers*, 418 U.S. at 286-87.

The first factor we consider is the broad context of Kahele's statements, paying particular attention to setting, subject matter, format, and tenor. *Underwager*, 69 F.3d at 366. Here, the setting was a labor dispute which had been years in the making. The origins of the dispute dated back to the concessions made by YLDC's employees at the time of Drace's acquisition of YLDC in 1984. In 1988, when the Union asked Drace to "repay" these concessions, Drace claimed that he was unable to do so because of YLDC's poor financial health. Drace made alternative proposals, which the Union repeatedly refused to accept. The Union offered counter-proposals, which Drace similarly refused to accept. These negotiations went on for months, during which time the disputants' positions became further entrenched and their treatment of one another grew increasingly hostile. The negotiations ended in an impasse, which was followed by a strike and the eventual decertification of the Union.

Labor disputes are oftentimes difficult, discordant, drawn-out affairs in which both labor and management exaggerate the strength of their bargaining positions in an attempt to coerce their opponent into concession. As *Linn* recognized: "[T]he language that is commonplace [in a labor dispute] might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn*, 383 U.S. at 58 (citing *Cafeteria Employees Union, Local 302 v. Angelos*, 320 U.S. 293, 295 (1943); *see also NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960) (observing that "The parties [to a collective bargaining agreement] . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement").

In such a heated and volatile setting, even seemingly "factual" statements take on an appearance more closely resembling opinion than objective fact. *See Underwager*, 69 F.3d at 367 (finding that statements made in "heated debate" were more like opinions than factual assertions); *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890, 894 (9th Cir. 1988) (observing that "[e]ven apparent facts must be allowed as opinion when the surrounding circumstances of a statement are those of a heated political debate") (internal quotation marks omitted); *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980) (observing that "[e]ven

apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in . . . [a] heated labor dispute").

[4] Further, the format, subject matter, and tenor of Kahele's statements suggests that the statements were a rhetorical device employed to further the Union's bargaining strategy, not statements of objective fact. The statements were made at internal union meetings. Both the September 11 and the September 29 statements followed Drace's refusal to meet the Union's demands. Accordingly, Kahele's statements may have been intended to communicate to those present that, regardless of YLDC's financial condition, the Union had to compel Drace to address their concerns. Alternatively, Kahele's statements could have been a way of demanding that Union members and YLDC employees call Drace's bluff, e.g., Kahele may have been saying to the Union "now is not the time to concede." In sum, the broad context of Kahele's statements weighs in favor of construing the statements as opinion rather than as objective fact.

[5] The second factor we consider is the specific context and content of the statements. *Underwager*, 69 F.3d at 366. This factor requires us to evaluate "the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in [the] particular situation." *Id.*

[6] The Union insists that Kahele's statements are "loose, figurative expression[s] that suggest to the listener that the speaker is communicating an impression or idea but not an objective fact." We disagree. Kahele's statements, rather than employing figurative and loose language, employ plain, unadorned language. Although Kahele's terminology is

somewhat abstract, e.g., "making money" and "hiding money," Kahele's statements do not employ the type of language that courts of this circuit have previously found to be loose and figurative. *See id.* at 367 (finding statements that plaintiff "must have trouble sleeping" and "was obviously looking at greener pastures" to be colorful, figurative rhetoric); *see also Weiner v. San Diego County*, 210 F.3d 1025, 1032 (9th Cir. 2000) (finding district attorney's statement to press that "cases, unlike fine wine, get worse rather than better, with age" to employ figurative language); *Cochran v. NYP Holdings*, 58 F. Supp. 2d 1113, 1124(C.D. Cal. 1998) (finding statement that "[plaintiff] will say or do just about anything to win, typically at the expense of the truth" to be "loose and figurative").

[7] Nevertheless, the absence of loose, figurative language here is of only minimal significance because the Union meetings at which Kahele made his statements were "circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole." *Info. Control Corp., 611 F.2d at 784* (internal quotation marks omitted); *see also Gilbrook*, 177 F.3d at 862 ("During the course of a public debate or a labor dispute, a reasonable audience would anticipate epithets, fiery rhetoric, or hyperbole."); *Underwager*, 69 F.3d at 367 (observing that audience to discussion of legal defense tactics "would expect emphatic language on both sides" and therefore "would be likely to recognize that the statements did not represent provable assertions"); *Films of Distinction, Inc. v. Allegro Film Prods., Inc.*, 12 F. Supp. 2d 1068, 1081 (C.D. Cal. 1998) (finding that audience viewing film, which depicted youth watching Crime Channel and proceeding to commit several murders,

"would understand that the statements did not represent provable assertions, particularly in light of the ongoing public debate over what causes children to commit violent crimes").

The Employers maintain, however, that the reasonable expectations of the audience in this particular case were that Kahele's statements were factual assertions. In support of this contention they rely on the district court's finding (1) that Kilakalua "believed what the Union told her to be true" and (2) that "Kilakalua's reaction to the statements made by the Union reflected the reaction of other bargaining unit employees."

[8] Although there is support in the record for the district court's first finding, i.e., that Kilakalua believed what the Union told her to be true, the record does not support the court's imputation of Kilakalua's belief to the other employees. Even assuming, however, that Kilakalua and the other employees believed Kahele's statements to be true, believing a statement to be "true" is not synonymous with believing a statement to be "an assertion of objective fact." Kilakalua may very well have believed that what Kahele said was true, but this does not in itself remove Kahele's statements from the realm of opinion.

Moreover, an examination of the entirety of Kilakalua's testimony supports the conclusion that the reasonable expectation of Kahele's audience would *not* be that Kahele's statements asserted objective fact. Kilakalua testified that, on September 29, "Mr. Kahele said Mike Drace is making money from the Steam Press, and *they going check on that.*" Based on this testimony, the district court found that Kahele "state[d] that Drace was making money from Steam

Press and that *the Union was going to check on that.*" The phrase "going to check on that" is a significant qualifier because it gave Kahele's audience a reason to construe his statements as opinion rather than fact.[5]

[9] Additionally, Kilakalua testified that she heard Drace's side of the story from Drace himself, who told her that he "wasn't making money from the Steam Press." Kilakalua "didn't believe [Drace] because the union already told [the employees] that he was making money." A reasonable audience confronted with two competing stories, in the context of a heated labor dispute, would be inclined to conclude that each story represented the subjective view, or the negotiating stance, of the particular speaker; the audience would be reluctant to view either story as objective fact. Kilakalua's testimony suggests merely that she chose to believe the Union's -- rather than the Employers' -- side of the story. Thus, as with the broad context of Kahele's statements, we find that the specific context weighs in favor of construing the statements as opinion.

[10] Lastly, we must determine whether the statements at issue are provable as true or false. *Underwager*, 69 F.3d at 366. In conducting our inquiry, we are guided by the maxim that "where the question of truth or falsity is a close

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[5] The Employers point out that, immediately prior to the strike vote, Kahele and Takaki stopped working on the review of YLDC's financial records. Although this fact would be relevant to an inquiry into actual malice, it does not assist us in determining the reasonable expectations of Kahele's audience because there is no evidence that Kahele's audience knew that the inquiry into YLDC's financials had been put on hold.

one, a court should err on the side of nonactionability." *Partington*, 56 F.3d at 1159.

The Union contends that the statements "Drace is making money" and "Drace is hiding money" are abstract phrases lacking specific referents. The Union emphasizes that, because each phrase is subject to multiple interpretations, they are not susceptible of verification. Accordingly, the Union continues to argue that the statements are more like opinion than fact.

The Employers maintain that Kahele's statements are necessarily false because YLDC was experiencing financial difficulty during and prior to the strike. They emphasize that "[the fact that] YLDC was not making money was proven true by Defendants' own [accountant], and Kahele knew it." The Employers contend that, because the statements are provable as true or false, they should be construed as fact rather than opinion.

[11] The fatal flaw in the Employers' argument is that it assumes the meaning of the terms upon which it relies. A phrase like "making money" does not possess a singular, concrete, and therefore readily verifiable, meaning. One seeking to prove the truth or falsity of Kahele's statements would need to clarify the meaning of the statements in order to become capable of determining whether they have an empirical foundation. For example, does the term "money" refer to profit or does it refer to earnings? What is the temporal scope of the phrase "making money"? Is the speaker referring to quarterly earnings, annual profit, or some other figure? Phrased in such abstract language, Kahele's statements do not rest on a "core of objective evidence," *Underwager*,

69 F.3d at 367, and are simply not susceptible of being proved true or false. Thus, this factor, like the previous two, weighs in favor of construing Kahele's statements as opinion rather than fact.

[12] Freedom of speech is an essential component of the labor-management relationship. Collective bargaining will not work, nor will labor disputes be susceptible to resolution, unless both labor and management are able to exercise their right to engage in "uninhibited, robust, and wide-open" debate. *Sullivan*, 376 U.S. at 270. Indeed, the Supreme Court has recognized that "federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers*, 418 U.S. at 283. Here, the totality of the circumstances reveals that Kahele's statements were a call to arms, not assertions of objective fact. Kahele's statements are not defamatory, and therefore they are fully protected by federal labor law.[6] *See id.* at 286-87. Accordingly, we reverse the district court's defamation judgment and vacate the court's damages award.[7]

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[6] Because we conclude that Kahele's statements are not defamatory, we need not address the parties' remaining arguments relating to the defamation issue. In particular, we do not reach the issue of "actual malice." *See Letter Carriers*, 418 U.S. at 284 ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.").

[7] For the sake of clarity, we briefly address a particularly troubling aspect of the district court's damages award. The court not only awarded damages to Drace and YLDC for harm to reputation, but it also awarded damages to YLDC for economic harm caused by

B. The Employers' Appeal

1. Breach of the collective bargaining agreement.

The Employers contend that the district court erred in

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the strike. The court based this component of the award on two premises: (1) Kahele's defamatory statement caused the strike; and (2) the strike caused economic harm to YLDC. We find both premises problematic. Assuming *arguendo*, however, that both premises are true, the court's award of defamation damages to YLDC based on harm caused by the strike is nevertheless erroneous. The court's award conflates defamation damages with strike damages, an unjustified extension of *Linn* and its progeny. *See Linn*, 383 U.S. at 65. Further, the court's damages award conflicts with federal labor law because, in awarding defamation damages for harm purportedly caused by peaceful strike activity, the court impermissibly applied state law to regulate the process by which a union's strike decision is made. *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."); *Linn*, 383 U.S. at 59 n.3 (observing that under section 7 of the NLRA "employees have the right to self organization . . . and to engage in other concerted activity for mutual aid and protection"); *Int'l Union of United Auto., Aircraft and Agric. Implement Workers v. O'Brien*, 339 U.S. 454, 457, 94 L. Ed. 978, 70 S. Ct. 781 (1950) (holding that federal labor law does not "permit[ ] concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation."); *see also Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees, Div. 998 v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 389-90, 95 L. Ed. 364, 71 S. Ct. 359 (1951) (reiterating *O'Brien* rule).

dismissing their breach of contract claim, which alleged that the Union breached the terms of the MLA. The Employers contend that because the YLDC strike was over grievances which were covered by an arbitration clause in the MLA, the district court erred in reaching the "merits" of the Union's estoppel defense. According to the Employers, where an arbitration clause is in force, equitable defenses should be decided by an arbitrator, not by a court.

In *California Trucking Ass'n. v. Bhd. of Teamsters & Auto Truck Drivers, Local 70*, 679 F.2d 1275 (9th Cir. 1982), we observed that "when [a] contract calls for arbitral resolution of questions arising under the collective bargaining agreement," the equitable defense of repudiation is a matter to be decided in arbitration, not in court. *Id.* at 1282; *see also Local Union No. 370 of the Int'l Union of Operating Eng'rs v. Morrison-Knudsen Co., Inc.*, 786 F.2d 1356, 1358 (9th Cir. 1986) ("It is well-settled law that the question of whether repudiation [of a collective bargaining agreement] has occurred must normally be submitted to the arbitrator.").

In *California Trucking*, the CBA contained broad language which "required arbitration for all grievances or questions of interpretation arising under the [CBA] and all grievances or controversies affecting the mutual relations of the parties." *California Trucking*, 679 F.2d at 1285. The broad language of the grievance clause led the court to invoke the rule that the issue of repudiation "must normally be submitted to arbitration *when the contract calls for arbitral resolution of questions arising under the collective bargaining agreement.*" *Id.* at 1282 (emphasis added); *see also Morrison-Knudsen*, 786 F.2d at 1357-58 (holding that matters extrinsic to collective bargaining agreement, such as equitable

defenses, must be submitted to arbitration where collective bargaining agreement required "all unsettled grievances" to be submitted to arbitration); *Auto, Marine & Specialty Painters Local No. 1176 v. Bay Area Sealers, Inc.*, 577 F.2d 609, 610 (9th Cir. 1978) (holding that defense of abandonment to petition to compel arbitration of grievances must be adjudicated by arbitrator where collective bargaining agreement provided for arbitration of "all disputes and grievances").

Here, however, the MLA does not employ broad language of the sort found in *California Trucking* and similar cases. Rather, the MLA's "Grievance Procedure" provides for arbitration only where "any employee covered under the terms of this agreement or . . . the Union believes that the Employer has violated the express terms of this agreement." The MLA does not require the employer to bring its claims in arbitration, nor does it contain any language requiring grievances arising out of the MLA to be submitted to arbitration. Thus, there is nothing in the MLA that would require the district court to submit the repudiation issue to arbitration, and the court acted within its authority in ruling on the Union's repudiation defense.

As for the merits of the district court's ruling, in *California Trucking*, this Court found repudiation where a party expressly stated in pleadings that it was not bound by the CBA. *California Trucking*, 679 F.2d at 1284-85. Here, the Employers represented a number of times during negotiations that they were not bound by the MLA. Although the Employers' repudiation was not in the pleadings, the Employers' conduct is at least as egregious as that of the repudiating party in *California Trucking*. If anything, the

conduct of the Employers in this case is more egregious. In pre-strike negotiations, the Employers represented that they were no longer bound by the MLA. After the strike, the Employers sued for breach of the MLA in federal court. At trial, Drace testified that the earlier repudiation was a mere bargaining position. Now, after losing in the district court, the Employers contend that the district court should not have decided the very issue that they brought before the court, and urge this Court to reverse and send the repudiation issue to an arbitrator. Under *California Trucking*, this sort of conduct constitutes repudiation of a CBA, and estops the repudiating party from relying on the CBA. *See id.* We therefore affirm the district court's dismissal of the Employer's breach of contract claim.

2. The RICO claim.

The Employers next contend that the district court erred in granting summary judgment to the Union on the Employers' racketeering claim. Specifically, the Employers argue that they established open-ended continuity by showing that "Kahele's regular way of controlling the Union as an enterprise is doing business with racketeering methods."

"A violation under section 1962(c) requires proof of: 1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity." *Howard v. America Online Inc.*, 208 F.3d 741, 746 (9th Cir. 2000) (internal citation omitted). In order to show a pattern, a complainant must demonstrate that the alleged predicate acts were both related and continuous. In turn, "to satisfy the continuity requirement, [a complainant] must prove either a series of related predicates extending over a substantial period of time, i.e., closed-ended continuity, or

past conduct that by its nature projects into the future with a threat of repetition, i.e. open-ended continuity." *Howard*, 208 F.3d at 750 (citations omitted).

Here, the district court correctly determined that the Employers' evidence of predicate acts was limited to Union conduct related to, and occurring during, the strike of the YLDC employees. Such predicate acts, which occur entirely within the context of a single labor strike, do not "by nature" project into the future or constitute "a regular way of doing business." *See id.* If anything, the threat of ongoing activity seems highly unlikely where the strike has ended and the Union has been decertified. *See id.* at 750-51 ("Plaintiffs present no facts indicating that misleading advertising would continue into the future, particularly given that the problems stemmed from a one-time change in pricing policy."); *Durning v. Citibank, Int'l*, 990 F.2d 1133, 1139 (9th Cir. 1993) (holding that predicate acts arising from a single event, the dissemination of a misleading document, did not satisfy open-ended continuity requirement). Accordingly, we affirm the district court's summary judgment on the racketeering claim.

3. Attorneys' fees.

Lastly, the Employers contend that the district court erred in denying their request for attorneys' fees. The Employers filed a motion in the district court for partial summary judgment due to sham answer and obstruction of justice. The district court denied both the motion and the accompanying request for attorneys' fees. The Employers do not challenge the denial of their motion for partial summary judgment. Rather, they challenge solely the district court's

refusal to award them attorneys' fees in connection with their unsuccessful motion. As we understand the Employers' argument, they contend that they are entitled to attorneys' fees, under 28 U.S.C. § 1927,[8] because the Union's denials of allegations in the complaint were false and misleading and had the effect of multiplying the proceedings.

Significantly, the Employers do not explain why they are entitled to an award of attorneys' fees in connection with a motion that was denied by the district court. Moreover, the district court's reasoning is sound, and its conclusion correct. The court found that (1) the Employers failed to demonstrate recklessness or bad faith on the part of the Union (as required for an award of attorneys fees under section 1927, *see Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998)); (2) the Employers failed to show how the Union's conduct "unreasonably multiplied the proceedings"; and (3) the Employers failed to provide adequate factual support for their contentions. Accordingly, the court refused to award the Employers attorneys' fees. We adopt this sound analysis and affirm the denial of the Employers' request.

CONCLUSION

With respect to the Union's appeal challenging the district court's defamation judgment, we reverse and vacate

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[8] Section 1927 provides, in pertinent part, that "Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

the court's damages award. Kahele's statements are protected, and cannot serve as a basis for state tort law liability.

With respect to the Employers' claims for breach of contract and racketeering, we affirm. We also affirm the district court's denial of the Employers' request for attorneys fees. Neither party to be awarded costs on appeal.

AFFIRMED in part, REVERSED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 99-00187 HG

[Filed January 2, 2002]

STEAM PRESS HOLDINGS, INC. dba YOUNG LAUNDRY AND DRY CLEANING, and MICHAEL DRACE, Plaintiffs,	)
v.	)
HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, Defendants.	)

JUDGMENT

This action having come on for pretrial hearings and trial before the court, Honorable Helen Gillmor, presiding, without a jury, and the entire record in this matter having been considered and the issues having been duly heard, considered and tried, and decisions by the court having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff Michael Drace recover from Defendant Hawaii Teamsters and Allied Workers, Local 996 the sum of $100,000 with interest thereon at the rate specified in 28 U.S.C. § 1961(a) from the date of this Judgment;

That Plaintiff Steam Press Holdings, Inc. recover from Defendant Hawaii Teamsters and Allied Workers, Local 996 the sum of $1,429,454.03, with interest thereon at the rate specified in 28 U.S.C. § 1961(a) from the date of this Judgment;

That Plaintiffs recover their costs of action; and

That this is the final judgment in the action into which all prior orders and decisions of the Court are incorporated and by which all issues in this action are resolved.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 2, 2002.

/s/_____
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

NO. 99-00187 HG

[Filed December 13, 2001]

STEAM PRESS HOLDINGS, INC. dba YOUNG LAUNDRY AND DRY CLEANING, and MICHAEL DRACE,	)
Plaintiffs,	)
v.	)
HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, as an individual, DOE DEFENDANTS 1-150,	)
Defendants.	)

SUPPLEMENTAL ORDER REGARDING DAMAGES

On September 28, 2001, the Court awarded $885,323.55 to Young Laundry & Dry Cleaning ("Plaintiff"), and $100,000 to Michael Drace, to be paid by Local 996 ("Defendant"). The Court also awarded Plaintiff additional

damages to be determined after submission to the Court of supplemental memoranda and evidence by the parties.

On October 18, 2001, Plaintiffs' Memorandum Regarding Interest and Unemployment Insurance Issues ("Pls. Memo.") was filed.

On November 7, 2001, the Response of Defendants to Plaintiffs' Memorandum Regarding Interest and Unemployment Issues ("Defs. Resp."), and the Declaration of Christian Tregillis in Reference to Plaintiff's Calculation of Interest and Unemployment Insurance Expenses ("Tregillis Decl."), were filed.

On November 15, 2001, Plaintiff Steam Press Holdings, Inc. dba Young Laundry and Dry Cleaning and Michael Drace's Motion for Entry of Judgment and Notice, which is more aptly characterized as an unauthorized reply memorandum, was filed.

On November 29, 2001, Defendants' Opposition to Plaintiffs Steam Press Holdings, Inc. d/b/a Young Laundry and Dry Cleaning, and Michael Drace's Motion for Entry of Judgment and Notice ("Defs. Opp. to Pls. Mot. for Entry of Judgment"), as well as the Declaration of Jeffrey L. Cutler in Support of Defendants' Opposition to Plaintiffs Steam Press Holdings, Inc. d/b/a Young Laundry and Dry Cleaning, and Michael Drace's Motion for Entry of Judgment ("Cutler Decl."), were filed.

On December 4, 2001, Plaintiffs Steam Press Holdings, Inc. dba Young Laundry and Dry Clea[n]ing and Michael Drace's Objections to Declaration of Christian

Tregillis was filed. Plaintiffs object to the Declaration of Christian Tregillis and request the Court not to consider it as evidence. The Court has reviewed the Declaration of Christian Tregillis and Plaintiffs' Objections thereto, and determines that it will consider all of the filings of both parties including the Declaration, along with Plaintiffs' objections and arguments against the Declaration.

ANALYSIS

Pursuant to the Court's Findings of Fact and Conclusions of Law and Order filed September 28, 2001, as amended on October 29, 2001 ("Amended Order), Defendant Local 996 is liable to Plaintiff Young Laundry & Dry Cleaning for (I) additional unemployment insurance taxes, and (II) emergency loan interest and additional interest on existing debt. The Amended Order states in part:

> 3. **Defendant Local 996 is also liable to PLAINTIFF YOUNG LAUNDRY & DRY CLEANING in accordance with the following:**
>
> Future Additional Unemployment Insurance Taxes
>
> The Court awards the present value of the amount which YLDC has paid since June 9, 2000, and is liable to pay in the future, for the unemployment insurance rate increase due to the strike. Plaintiff shall

submit a memorandum and appropriate proof of the amount awarded twenty days from the date of the filing of the original Order on September 28, 2001. Defendant shall respond within twenty days of the filing by Plaintiff.

Emergency Loan Interest and Additional Interest on Existing Debt

The Court awards the present value of all interest expense with respect to the $200,000 emergency loan from the Bank of Hawaii, and the additional interest expense on YLDC's existing debt to Applebaum, Al Phillips, and Bank of Hawaii, up until the date of the original Order on September 28, 2001. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded twenty days from the date of the filing of the original Order on September 28, 2001. Defendant shall respond within twenty days of the filing by Plaintiff.

(Amended Order at 88.)

I. Future Additional Unemployment Insurance Taxes

Defendant is liable to Plaintiff for "the present value of the amount which YLDC has paid since June 9, 2000, and is liable to pay in the future, for the unemployment insurance rate increase due to the strike." (Amended Order at 88.) The original drain on Plaintiff's reserve account was approximately $344,000 in benefits paid to the striking workers. The Court has already awarded Plaintiff the $17,161 it paid in 1999 in additional payroll taxes as a direct result of the strike. (Id. at 87.)

Plaintiff calculates additional unemployment insurance taxes to fall between $365,000 and $400,000, and requests $400,000. (Pls. Memo. at 6, 11.) Defendant calculates the amount to be $236,020.81. (Ex. 2, attached to Defs. Resp.) In arriving at the different figures, the following factors must be considered: (A) the lack of specificity as to the rate of actual payment to be made in the future, and (B) the past assessment and possible future assessment of penalties for amounts underpaid by Plaintiff.

A. Lack of Specificity as to Rate of Actual Payment to be Made in the Future

Plaintiff argues alternative rates of payment, leaving to the Court to decide which rate is most appropriate.

Defendant argues that the actual rate at which Plaintiff has been paying the additional unemployment insurance taxes should be the rate for determining future payments. The actual rate of payment is not an appropriate rate at which to determine the present value of future additional

unemployment insurance taxes. At the actual rate of payment, Plaintiff has underpaid $53,662.70 as of June 30, 2001. (Teruya Letter at 2, Ex. A, attached to Pls. Mot. for Entry of Judgment.) Defendant's calculations do not include the penalty and interest amounts assessed against Plaintiff, but not yet paid. In addition, as the October 17, 2001 letter from the Labor Division of the Department of the Attorney General states, the contributions to be assessed by the State against Plaintiff in the future, for unemployment insurance taxes, depends "on many factors which have yet to be determined, e.g. the amount YLDC contributes for each quarter, the amount of benefits charged during the quarters, and the contribution rate schedule which has yet to be determined for the year 2002." (Id.)

The rate of actual repayment to be made in the future is unclear. What is clear is once Plaintiff has funds from the judgment, Plaintiff's rate of future repayment should be greater than the past actual rate of repayment, and there should be no future penalties.

B. Penalty and Interest on Underpaid Amounts

In its calculations, Plaintiff includes a ten percent penalty for late payment. Plaintiff has been assessed $9,744.36 in penalties and interest due on the unpaid contributions as of June 30, 2001.[1] (Id.) The penalties and interest assessed are only for unpaid contributions. (Cutler Decl. ¶ 9, in support of Defs. Opp. to Pls. Mot. for Entry of Judgment.)

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[1] Only in the subsequent November 15, 2001 filing does Plaintiff present evidence of penalties assessed.

Plaintiff is correct that it should be compensated for the penalties and interest assessed against it prior to September 28, 2001. Defendant is not liable, however, for penalties and interest assessed after September 28, 2001. Following entry of judgment, Plaintiff will be awarded the present value of the tax, calculated as of September 28, 2001, to satisfy the obligation. There will be no reason for Plaintiff not to make future payments on a timely basis. To the extent the contributions are not paid until the judgment is satisfied, post-judgment interest compensates Plaintiff for those costs.

C. Fair Amount

Based on the evidence before the Court and the methods of calculation proposed by the parties, as corrected by the above-mentioned factors, the Court finds that an award of $290,000 approximates, as closely as possible given the evidence before the Court and the uncertainty as to the rate of future payments, the present value of the amount which Plaintiff has paid since June 9, 2000, and is liable to pay in the future, for additional unemployment insurance taxes due to the strike.

II. Emergency Loan Interest and Additional Interest on Existing Debt

The category entitled "Emergency Loan Interest and Additional Interest on Existing Debt" relates to four separate debts: (A) emergency loan from Bank of Hawaii, (B) existing debt to Applebaum, (C) existing debt to Al Phillips, and (D) existing debt to Bank of Hawaii. Defendants only dispute Plaintiff's figures as to the existing debt to Applebaum.

A. Emergency Loan from Bank of Hawaii

Plaintiff was awarded "the present value of all interest expense with respect to the $200,000 emergency loan from the Bank of Hawaii." (Amended Order at 88.) Plaintiff claims, and the Court finds, the amount to be $52,117. (Pls. Memo. at 11; Ex. 68, attached to Pls. Memo.) Defendant does not contest this amount. (Defs. Resp. at 3.)

B. Existing Debt to Applebaum

Plaintiff was awarded "the present value of . . . the additional interest expense on YLDC's existing debt to Applebaum . . . up until the date of the original Order on September 28, 2001." (Amended Order at 88.) Plaintiff claims the amount is $91,821.14. (Ex. 68.) Defendant claims the amount is $26,344.00.[2] (Tregillis Decl. at 6.)

The Court's identification of the "existing debt to Applebaum" in its Amended Order refers to the promissory notes that make up the existing debt relating to Plaintiff Michael Drace's purchase of YLDC. Plaintiff's calculation is based on these three promissory notes. (Drace Decl. of Nov. 15, 2001 ¶¶ 2-5, Ex. A, attached to Pls. Mot. for Entry of Judgment; Tr. 2:173.) Defendant's calculation accounts for only one of the notes. (Drace Decl. ¶ 3.) The Court finds that Plaintiff's calculation correctly takes into account the three promissory notes that make up the existing debt to

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[2] Defendant states the amount to be $26,344.46 in its Response, but $26,344.00 in the Declaration of Christian Tregillis which is the basis for Defendant's calculation. (Defs. Resp. at 2; Tregillis Decl. at 6.)

Applebaum. According to the Declaration of Michael Drace: "If [Defendant's expert] Tregillis had started with and considered the entire principal balance as of September 30, 1998 of $1,680,619.70, his approach would have yielded an answer very close to the projections set forth by Unice Chang, who knows first hand what she was talking about." (Id. ¶ 6.) The Court notes that only in the subsequent November 15, 2001 filing did Plaintiff come forward with appropriate evidence of the components of the existing debt to Applebaum for the Court and Defendant to make the appropriate calculations.

Taking into account the three notes that comprise the Applebaum debt, the Court finds Plaintiff's figure, $91,821.14, accurately reflects the present value of the additional interest expense on Plaintiff's existing debt to Applebaum up until the date of the original Order on September 28, 2001.

C. Existing Debt to Al Phillips

Plaintiff was awarded "the present value of . . . the additional interest expense on YLDC's existing debt to . . . Al Phillips . . . up until the date of the original Order on September 28, 2001." (Amended Order at 88.) Plaintiff claims, and the Court finds, the present value of the additional interest expense on its existing debt to Al Phillips to be $8,598.69. (Ex. 68.) Defendant does not contest this amount.[3] (Defs. Resp. at 3.)

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[3] In its Response, Defendant states the amount is $8,476.92, which appears to be derived from Plaintiff's calculation in Exhibit 65. (Defs. Resp. at 2; Ex. 65, attached to Pls. Memo.)

D. Existing Debt to Bank of Hawaii

Plaintiff was awarded "the present value of . . . the additional interest expense on YLDC's existing debt to . . . Bank of Hawaii, up until the date of the original Order on September 28, 2001." (Amended Order at 88.) Plaintiff claims, and the Court finds, the amount to be $101,593.65. (Ex. 68.) Defendant does not contest the amount.[4] (Defs. Resp. at 3.)

CONCLUSION

IT IS HEREBY ORDERED that Defendant Local 996 is liable to Plaintiff Young Laundry Dry Cleaning for the following amounts, current as of September 28, 2001, in addition to the amounts specified in the Amended Order filed October 29, 2001:

Future additional unemployment insurance taxes:
$290,000.00

Emergency loan interest and additional interest on existing debt:

Emergency loan	$52,117.00
Existing debt to Applebaum	$91,821.14
Existing debt to Al Phillips	$ 8,598.69

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[4] In its Response, Defendant states the amount is $99,306.69, which appears to be derived from Plaintiff's calculation in Exhibit 65. (Defs. Resp. at 2; Ex. 65, attached to Pls. Memo.)

Existing debt to Bank of Hawaii	$101,593.65
	$254,130.48
Total Supplemental Award:	**$544,130.48**

POSTJUDGMENT INTEREST at the applicable rate specified at 28 U.S.C. § 1961(a) is awarded from the date judgment is entered until satisfied.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, December 13, 2001.

/s/_____
Helen Gillmor
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 99-00187 HG

[Filed October 29, 2001]

STEAM PRESS HOLDINGS, INC. dba YOUNG LAUNDRY AND DRY CLEANING, and MICHAEL DRACE,	)
Plaintiffs,	)
v.	)
HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, as an individual, DOE DEFENDANTS 1-150,	)
Defendants.	)

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

This action arose in connection with a labor dispute and subsequent strike that involved the employees of Young Laundry and Dry Cleaning (YLDC) in late 1998 through May 1999. The matter came on for trial before the Court on

October 31, November 1, 2, 3, 4, 7, 8, and 10, 2000, on Plaintiff's remaining claims for Unfair Labor Practices (Count I), Defamation relating to the financial condition of YLDC (Count III), Breach of the Collective Bargaining Agreement (Count VI), and Punitive Damages (Count VII). Jared H. Jossem and Lynne Toyofuku appeared on behalf of Plaintiffs Steam Press Holdings, Inc. dba Young Laundry and Dry Cleaning, and Michael Drace. Jeffrey L. Cutler and Gordon Kim appeared on behalf of Defendants Hawaii Teamsters and Allied Workers, Local 996, and Mel Kahele as an individual.

On November 3, 2000, Plaintiffs filed Amendments to Complaint Filed March 9, 1999. On November 10, 2000, Defendants' Answer to Amendments to Complaint was filed. On November 20, 2000, Plaintiff Steam Press Holdings, Inc. dba Young Laundry and Dry Cleaning, and Michael Drace's Post-Trial Proposed Findings of Fact and Conclusions of Law was filed. On November 22, 2000, Defendants' Post-Trial Brief was filed, along with the Proposed Findings of Fact and Conclusions of Law of Defendants Hawaii Teamsters and Allied Workers, Local 996 and Mel Kahele, and Defendants' Objections to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. On November 24, 2000, Plaintiffs' Reply to Union's Proposed Findings of Facts and Conclusions of Law was filed.

On January 12, 2001, the Court issued an Order Granting Defendants' Motion for Summary Judgment With Respect to Count V of Plaintiffs' Complaint (RICO claim). On January 23, 2001, the Court issued an Order Denying Defendants' Motion for Reconsideration of the Court's October 5, 2000 order denying Defendants' motion for

summary judgment as to Count I (unfair labor practices claim).

On March 6, 2001, Plaintiffs filed an Ex Parte Motion for Leave to File Amended Proposed Findings of Fact and Conclusions of Law Paragraph #21, which the Court allowed by Minute Order on March 6, 2001. Pursuant to the March 6, 2001 Minute Order, Plaintiffs filed an Amended Proposed Findings of Fact and Conclusions of Law on March 13, 2001, and Defendants filed a Memorandum of Points and Authorities in Opposition to Plaintiffs' Ex Parte Application for Leave to File Amended Proposed Findings of Fact and Conclusions of Law on March 20, 2001. On March 23, 2001, Plaintiff's Ex Parte Motion for Leave to File Objections to Defendants' Memorandum, lodged March 22, 2001, was denied by the Court.

The Court, having considered the pleadings filed herein and the testimony at trial, and having an opportunity to judge the credibility of the witnesses, to examine the exhibits admitted into evidence, and to consider the arguments of counsel, pursuant to Federal Rule of Civil Procedure 52, makes the following Findings of Fact and Conclusions of Law and Order. Any finding of fact that should more properly be deemed a conclusion of law and any conclusion of law that should more properly be deemed a finding of fact shall be so construed.

I. FINDINGS OF FACT

Parties

1. **Enivel, Inc. dba Young Laundry and Dry Cleaning**. Enivel, Inc. dba Young Laundry and Dry Cleaning ("YLDC") is a retail dry cleaning and laundry business in the State of Hawaii.

2. Prior to 1994, YLDC was owned by David Applebaum ("Applebaum"), with Robert Wiviott as a 25% investor. (Tr.2:143-145.) While owned by Applebaum, Michael Drace ("Drace"), a YLDC employee, began to play a substantial role in the management of YLDC. In 1980, Drace became involved in labor negotiations while an employee of YLDC. (Tr. 3:43.)

3. By sometime between 1986 and 1988, Drace was general manager of YLDC and began taking the lead role in labor negotiations with the Union. (Tr. 3:43.)

4. **Michael Drace and Stem Press Holdings, Inc.** Enivel, Inc. dba YLDC was sold to Drace on September 30, 1994. (Tr. 5:29.) Drace formed Michael Drace, Inc. as a holding company for the shares of Enivel, Inc. Michael Drace, Inc. was renamed Steam Press Holdings, Inc. ("Steam Press") in 1995. Since 1995, Steam Press has held the stock of Enivel, Inc. dba YLDC. Drace is the president of YLDC. Applebaum and Wiviott are creditors of YLDC, as the $850,000 purchase price was by a 75% note to Applebaum and a 25% note to Wiviott. (Tr. 2:173.) Applebaum and

Wiviott have not received their monthly payments from Drace since September 30, 1998. (Tr. 2:173-174, 3:228-229.)

5. **Hawaii Teamsters and Allied Workers, Local 996**. Hawaii Teamsters and Allied Workers, Local 996 ("Union") is a labor organization, as that term is used in 29 U.S.C. § 152(5). (Tr. 1:108-09.)

6. In the summer of 1998, the Union was composed of approximately 5400 members and was a party to collective bargaining agreements with approximately 68 employers. (Tr. 6:31.)

7. **Mel Kahele**. Mel Kahele ("Kahele") is the President of the Union and has held that position since September 1996. (Tr. 1:108, 114.) As President, Kahele is responsible for overseeing day-to-day operations of the Union. (Tr. 6:28.)

Governing Labor Documents

8. **Master Laundry Agreement**. In 1984, the Union and YLDC negotiated and executed the Master Laundry Agreement ("MLA"), the collective bargaining agreement between the Union and the YLDC. (Ex. 1001.) The MLA governed economic and non-economic provisions relating to the respective rights and obligations of YLDC and the bargaining unit employees. (Id.)

9. The MLA was to be in effect from November 1, 1983 through October 31, 1986. (Id. at 000035.) Thereafter, the MLA automatically renewed, by its own terms, from year

to year, unless one of the parties served written notice of a desire to modify the agreement sixty days prior to the date of expiration of the agreement. (Id. at 000036.)

10. If a party provided written notice of a desire to modify the agreement, negotiations were to begin within fifteen days of the notice. (Id.)

11. Between 1986 and 1994, the MLA was extended and modified pursuant to various memoranda of understanding. (Tr.1:88.)

12. **1994 Sale of YLDC**. Around 1993, Applebaum considered liquidating the company, which would result in a loss of jobs for all employees. (Tr. 2:150.) Applebaum had been trying to sell YLDC because he found YLDC business to be unrewarding and he was unable to make any economic progress. (Id.)

13. At trial, Applebaum testified that YLDC was the only unionized dry cleaner in Honolulu and one of only two unionized linen supply companies. (Tr. 2:147.) The cost of labor for YLDC, therefore, was as much as 40 and 50 percent higher than what the competition was paying. (Id.; see also Tr. 1:81-82, 123-124.)

14. Drace agreed to purchase YLDC at near liquidation value, which saved the jobs of over one hundred employees. (Tr. 1:104, 2:151-54.) Part of Drace's motivation to purchase YLDC was to keep the employees working. (Tr. 1:90.) In exchange for giving up a "golden

parachute," valued at roughly $750,000, Drace was able to purchase YLDC almost entirely by debt. (Tr. 3:44.)

15. **Memorandum of Agreement**. As a condition of Drace's purchase of YLDC in 1994, the Union was asked to make certain concessions on employee compensations. (Tr. 1:100, 2:156.) On or about August 29, 1994, YLDC and the Union concluded the Memorandum of Agreement ("MOA"), which modified bargaining unit employee compensation. (Ex. 1002 at 120790.) Employees were given wage increases while holidays, vacation and sick days were reduced. Employees also lost certain health and retirement benefits pursuant to the MOA. (Tr. 5:28.)

16. When Drace assumed ownership of YLDC, he addressed the employees and explained why he needed the benefits concessions. (Tr. 1:87.) He expressed his hope that he would be able to restore these benefits in the future when the financial condition of the company improved. (Id.)

17. The bargaining unit employees ratified the MOA which significantly reduced their benefits while affording them a wage increase. (Tr. 1:101-102.)

18. The MOA indicated that "[t]he term of this agreement is four years from the closing date of the sale of the laundry business." (Ex. 1002 at 120788.) The business was sold on September 30, 1994. (Tr. 5:29-30.) Accordingly, the MOA's modifications of the Master Laundry Agreement would cease to be in effect on September 30, 1998 -- four years from the date of the sale of the business. (Tr. 5:29-30.)

19. The Court finds that the MOA did not alter the duration of the MLA. Rather, as Drace testified, the MOA expired by its own terms and did not modify the duration of the MLA. (Tr. 5:29-31.) This is consistent with past practices between the parties. As Applebaum testified, the various memoranda of understanding the parties concluded in the past expired by their own terms and the duration provision of each memorandum of understanding was not intended to modify the duration of the MLA, which extended from year to year. (Tr. 2:194-195, 197.)

20. The Court finds that the MLA was not permanently modified by Paragraph 3 of the MOA. Paragraph 3 of the MOA only limited the duration of the modifications of the MLA's cost provisions. Paragraph 3 of the MOA reads "[t]he term of this agreement is four years from the closing date of the sale of the laundry business." (Ex. 1002 at 120788) (emphasis added).) The only reasonable reading of this language is that the term of "this agreement," the MOA, is modified, not the duration of a separate agreement, the MLA.

21. The Court finds that the MLA continued to be in effect after the MOA expired after its four-year duration, despite Union argument that YLDC cannot claim that the MLA continued to be in effect at the time YLDC employees struck on October 8, 1998 because of representations made to the Union by YLDC in September 1998. At a September 25 meeting before the federal mediator, YLDC indicated to the mediator that the MLA was no longer in effect because it had been supplanted by the MOA. (Tr. 7:73-74.) Drace testified, however, and the Court finds, that YLDC had taken the

position that the MLA was not in effect purely as a negotiating position. (Tr. 5:35-38.) The Court finds that YLDC's conduct at the federal mediator's office does not reflect the true intent of the parties as to the duration of the MLA at the time the MOA was executed. By the conclusion of the September 25 meeting before the federal mediator, Drace testified that YLDC had accepted the majority of the non-economic terms of the MLA. (Id.) The Court finds that the MOA only modified the MLA's cost provisions. The MLA was not otherwise supplanted by the MOA and continued to be in effect beyond the four-year duration of the MOA. This finding is consistent with the parties' past practices. (Tr. 2:197, 1:88.)

22. The MOA expired by its own terms on September 30, 1998. The Court finds the MLA was not modified to also expire on the same date.

1998 Labor Negotiations

23. As of the Summer of 1998, the parties continued to operate under the Master Laundry Agreement, as it had been renewed from year to year. The MLA remained in effect as modified by the Memorandum of Agreement, which was concluded in 1994 as part of the sale of YLDC to Drace. The MOA modified certain provisions of the MLA relating to employee compensation (i.e., cost provisions.) The MOA left untouched the non-cost provisions of the MLA. (Tr. 1:88, 5:28.)

24. **Reopening of Negotiations**. On July 13, 1998, the Union sent notice to YLDC that it desired to reopen

negotiations of the MLA. (Ex. 1008.) The letter indicated that the Union proposed an improvement in wages, benefits and working conditions. (Id.) The July 13 letter seeking to modify the terms of the MLA was sent pursuant to the amendment provisions of the MLA. (Ex. 1001 at § 39.)

25. **YLDC's First Proposal**. On July 21, 1998, YLDC responded to the Union's letter reopening negotiations. (Ex. 1009.) YLDC forwarded a proposed agreement which would further reduce its labor costs. (Ex. 1010.) The letter informed the Union that YLDC was struggling to survive. (Ex. 1009.)

26. In previous negotiations with the Union, Applebaum had also claimed financial hardship and a competitive disadvantage based on labor costs. (Tr. 2:178.) At trial, Applebaum testified that he had been anxious to sell for some time because the business had become nonrewarding and he could not make progress. (Tr. 2:150.) He testified that "[t]he company is insolvent" and estimated its net worth to be "a shade under a negative $2 million." (Tr. 2:170-171.)

27. Drace's July 21, 1998 letter to the Union explained the financial woes of YLDC. (Ex. 1009.) It informed the Union that YLDC had recently lost the Army and Air Force Exchange Services[1] contract ("military contract"), was unsuccessful in its bid to acquire the contract for a Marine base, that retail sales had shrunk, and that YLDC continued to operate at a competitive disadvantage relative to its non-unionized competition. (Id.) Drace also

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[1] Tr. 1:190.

expressed his desire to move toward parity with its competitors in terms of labor cost structure. (Id.)

28. YLDC's July 21 proposal sought reductions in fringe benefits and proposed small wage increases over the following three years. (Ex. 1010.)

29. Drace's July 21 letter invited the Union to arrange for its accountant to review YLDC's books. (Ex. 1009.) This was standard procedure from years past, when Applebaum was President. (Tr. 1:77, 98-99.)

30. **Union's Response to YLDC's First Proposal**. On July 28, 1998, the Union communicated its position that it would be premature to execute YLDC's proposed memorandum of understanding with the proposed benefit concessions. (Ex. 1012.) The Union indicated that it was conducting its own research into the company's finances and would organize a negotiating committee. (Id.) The Union did not look at the proffered financial records of YLDC.

31. On August 21, 1998, Union business agent and paralegal[2] Jessie Apodaca Torres ("Torres") wrote to the Teamsters International Union Research Department requesting business and financial information regarding YLDC. (Ex. 1014.)

32. **YLDC's Second Proposal**. On August 24, 1998, YLDC sent its second proposal to the Union. (Ex. 1015.) In a letter attached to the second proposal, Drace explained that

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[2] Tr. 1:131.

YLDC's financial situation had taken a turn for the worse in the previous five weeks. (Id.) Specifically, Drace explained that YLDC's health insurance carriers had come to YLDC with significant increases for the next policy year and that a non-union laundry is moving to compete with YLDC for its hotel laundry business. (Id.) YLDC also informed the Union that the summer months had shown disappointing sales and that sales from recently-acquired outlets had been disheartening. (Id.)

33. YLDC's second proposal sought alternating wage concessions of five percent for the first six months of the agreement, then wage increases if YLDC was profitable. (Id.; Tr. 5:57-58.) Drace explained that the wage cuts were necessary if YLDC was to remain solvent. (Ex. 1015.)

34. In the second proposal on August 24, 1998, YLDC again invited the Union to have its accountant review its books. (Id.; Tr. 1:148.)

35. **Union's Response to YLDC's Second Proposal**. By letter to Drace dated August 26, 1998, the Union again indicated its position that it would be premature to execute YLDC's August 24, 1998 proposed memorandum of understanding which reflected the benefit and wage concessions sought in the company's second proposal. (Ex. 1018.)

36. **Drace's Detailed Presentation of Financial Status of YLDC at the September 2 Bargaining Session**. YLDC and Union officials met to discuss modifications to the Master Laundry Agreement on September 2, 1998.

37. At the September 2 bargaining session, Drace made a detailed presentation of the company's financial condition. (Tr. 3:84.) Drace explained how YLDC and dry cleaning market in Hawaii had been shrinking and YLDC's competitors had become more aggressive in their pricing. (Ex. 1028.) Drace presented various charts demonstrating the loss of income YLDC was suffering. (Id.) He also discussed the severity of the loss of revenues YLDC was experiencing since losing the military contract several months earlier. The charts clearly demonstrated that YLDC was losing money. (See Tr. 3:66-84.)

38. Drace indicated at the September 2 meeting that without the Union's help, he was certain YLDC could not survive. (Tr. 3:82.) Drace informed the Union negotiating committee that YLDC's management had already taken pay cuts. (Tr. 3:84.)

39. **Torres' Refusal to Process Clear Information.** After Drace's detailed presentation on September 2, 1998, Union business agent Torres told Drace that charts can be made to show anything you wanted them to show. (Tr. 3:85.) Drace testified that he took offense to this reaction. (Tr. 3:85.) He explained: "I really kind of bared my soul to the union, hoping that they would understand that this was a serious situation." (Id.)

40. The Court finds that Torres, on this and other occasions, demonstrated an intransigent position in which she refused to process clear information presented to her.

41. **Union's First Proposal**. After Drace's presentation, the Union presented its first proposal which sought a restoration of the benefit concessions given in 1994 and wage increases of $1.00 per hour for the first year and $0.50 increases for each of the following two years. (Ex. 1029.) Kahele told Drace that the employees of YLDC could not accept the rollbacks proposed by Drace and that the Union considered Drace's proposal to be ludicrous. (Tr. 3:85-86.)

42. Drace was shocked at the Union's proposed wage increases, which ignored the financial woes he had outlined. Drace told Kahele "there's absolutely no way we can do this. It's a 25% increase." (Tr. 3:90.)

43. The September 2 meeting ended without an agreement. (Tr. 3:91.)

44. Drace posted a notice on a company bulletin board, informing the employees of the September 2 bargaining session. Drace also posted a copy of YLDC's proposal in which wage reductions were sought. (Tr. 3:109; Ex. 1032.)

45. On September 2, for the third time, Drace invited the Union to have an accountant review YLDC's books. (Tr. 3:91.) The Union again refused to avail itself of this offer. (Ex. 1033.) Drace memorialized Kahele's failure to review YLDC's books in a letter dated September 8, 1998 in which he expressed his frustrations: "To insist on holding additional bargaining sessions without knowledge of the facts would seem to me to be a waste of valuable time." (Id.)

46. **Dun & Bradstreet Report**. On or about September 8, 1998, the International Brotherhood of Teamsters responded to Torres' August 21, 1998 request for information about YLDC by sending Torres a Dun & Bradstreet Report ("D&B Report"). (Ex. 1031.) The D&B Report included information from various Dun & Bradstreet Services, such as a Business Information Report dated August 31, 1998; and Dun's Market Identifiers dated October 10, 1997, January 20, 1998, April 20, 1998, June 25, 1998, and July 14, 1998. (Ex. 1031 at 123143.)

47. A copy of the report was also provided to Kahele. (Tr. 1:179.) Kahele read the report and discussed its contents with Torres sometime prior to September 11, 1998. (Tr. 1:188, 6:130-131, 133.)

48. **Negative Information About YLDC's Financial Health.** The D&B Report contains numerous indications of YLDC's poor financial health.

49. Attached articles from the Honolulu Star-Bulletin dated April 22 and May 19, 1998 contain information that YLDC recently had to let 65 of its 200 employees go because of a "major setback" in losing the military contracts which it had held since 1982. (Ex. 1031 at 123146, 123147.) Kahele testified that Drace had explained to him that the loss of the military contracts amounted to a loss of approximately $100,000 per month in cash revenue for YLDC. (Tr. 1:194.)

50. A printout from Dun's Market Identifiers dated April 20, 1998 states that YLDC had weathered a twenty

percent decrease in the number of employees between three and one years ago. (Ex. 1031 at 123157.)

51. A section entitled Payment Summary states that YLDC's payments to suppliers average twenty-two days past due, and that only sixty-one percent of its payments are on time. (Id. at 123149.)

52. A printout regarding YLDC's "rate change" indicates a "fair" credit appraisal based on "slowness in meeting trade obligations and this company's number of years in business." (Id. at 123148.) Torres wrote a note on her copy of the D&B Report indicating that the credit rating of YLDC had dropped. (Tr. 6:117.)

53. The May 19, 1998 Honolulu Star-Bulletin article included in the Report indicates YLDC's agreement to acquire seven laundry drop-off locations. (Ex. 1031 at 123446.) According to the testimony of Drace at trial, the purchase of these drop-off locations was "to fill up the plant and to cover the high fixed cost of our operations." (Tr. 3:78.) The Court finds that the purchase of seven drop-off locations does not indicate YLDC's economic strength or profit.

54. **Sales Do Not Equal Profits**. Throughout the D&B Report, figures of projected sales of $7,000,000 (and other lesser amounts relating to specific store locations) appear. (Ex. 1031 at 123148, 123150, 123154, 123156, 123158, 123160, 123162.) The D&B Report provides no corresponding information about YLDC's total costs. (Id.) It is impossible, therefore, to determine YLDC's net gains or

losses – in other words, YLDC's profits, positive or negative, from the D&B Report.

55. **Outdated Information**. Torres testified that she called Jackie Bingham, a representative whose name and telephone number is listed on the first page of the D&B Report, to help her understand the D&B Report. (Tr. 6:123.) Torres testified that, in speaking with Bingham, she wrote a note on her copy of the D&B Report stating: "1996, no infor. after '96, per Jackie." (Tr. 6:120; Ex. 1031 at 123156.) Torres testified that this note reflected Bingham's response to Torres' question regarding the $7 million projection contained in the D&B Report, which was that the projection was based on data from 1996. (Tr. 6:125.) The Court finds that the $7 million figure in the D&B Report, if not more figures, is based on data from 1996. The figure, therefore, does not take into account the lost revenue due to the loss of the military contract in 1998. The Court also finds that Torres had knowledge of the outdated nature of the material.

56. Also on September 9, Torres went to the Department of Commerce and Consumer Affairs of the State of Hawaii. In researching the corporate filings of YLDC, Torres came across the name "Steam Press, Inc," but was uncertain as to its connection with YLDC. (Tr. 6:111-12.)

57. Torres told Kahele about Steam Press on September 10, explaining that she did not know what it was. Kahele told her to ask YLDC about it. (Tr. 6:134.)

58. **September 10 Bargaining Session and YLDC's Third Proposal**. On September 10, the parties held their

second bargaining session. (Tr. 3:92.) The negotiations took place at the Union hall.

59. At the September 10 meeting, YLDC presented its third proposal. The proposal was substantially similar to the proposal presented on August 24. It continued to seek a wage reduction of five percent but included increases after 6 months if a profit was shown after the first three months. (Ex. 1039, 1040; Tr. 5:57.)

60. The Union rejected YLDC's proposal. (Tr. 5:58.) The Union did not present a new proposal at the September 10 negotiation session. (Tr. 5:59.)

61. The September 10 negotiating session became heated at the time the parties began discussing the topic of Steam Press. Kahele asked Drace what Steam Press was, and Drace explained that Steam Press was simply a holding company for the stock of YLDC and that it was set up to invest the profits of YLDC. (Tr. 7:37.)

62. In response to Kahele's question as to how the Union could get financial information about Steam Press, Jossem, the attorney for YLDC, asked that requests regarding Steam Press be put in writing and sent to the attention of the YLDC. (Tr. 1:205.) The questions about Steam Press prompted Jossem to ask if the Union was calling YLDC a liar with respect to its financial woes. (Tr. 1:205.) Torres responded that they "can call the company a liar." (Tr. 7:39, 49.) Kahele added to Torres's statement, "we will." (Ex. 6; Tr. 1:204-205, 7:49, 7:57.) Kahele's testimony that he did not call the company a liar is not credible given substantial

evidence, including notes and testimony, to the contrary. (Ex. 6; Tr. 1:204-205, 7:49, 7:57.)

63. **September 11 Meeting Between Union and Employees**. One day after the heated exchange between the Union and YLDC, the Union held an informal meeting after work. (Tr. 5:163, 175.) The Union had sent notice to YLDC employees of a meeting of bargaining unit employees to occur on September 11, on September 9, 1998. (Ex. 1035.) The subject matter of the meeting was the current contract negotiations. (Id.)

64. The meeting was held outside the plant near a dumpster with YLDC bargaining unit employees in order to discuss the status of the contract negotiations. (Tr. 6:42.) Workers from the plant and some workers from the stores were present. (Tr. 5:163.)

65. At trial on November 7, 2000, Kahele testified that there were two groups each comprised of "approximately 30" YLDC employees. (Tr. 6:46.) On October 31, 2000, Kahele testified that he spoke to approximately 80 employees in "several groups." (Tr. 1:239.) Hannah Kilakalua testified that "over 40 or 50" workers were present at the meeting when she attended. (Tr. 1:58.) Bob Bruno estimated that when he arrived approximately 15 minutes prior to the scheduled meeting, approximately 40 employees were present, and by the time Kahele arrived, after Bruno had explained in several languages the status of the meetings between the Union and YLDC, there were approximately 80 employees in attendance. (Tr. 5:162-164.)

66. The Court finds that the number of employees at the meeting changed from approximately 40 when Bruno arrived, to between 40 to 50 employees when Kilakalua was present, and to 80 employees at some point during Kahele's 15 to 20 minute presentation. (Tr. 5:168.) Different groups came and left, but at one point, the number of employees reached 80.

67. **Defamatory Statements Made at the September 11 Meeting**. Plaintiffs allege that at a September 11 meeting with YLDC employees, Kahele made certain defamatory statements. In particular, Plaintiffs allege that Kahele said Drace was hiding money in a separate company called Steam Press. Plaintiffs also allege that Kahele said Drace was "making money from the Steam Press."

68. Plaintiffs also allege that at the September 11 meeting, employee Eddie Soria made certain defamatory statements, including a statement that Mike Drace was hiding money in a company called Steam Press. Soria, however, had not yet become a shop steward, and therefore was not a Union agent at the time of the September 11 meeting. (Tr. 4:63.)

69. Evidence of the defamatory remarks and the repercussions among the workers following the September 11 meeting is covered later in the findings.

70. **September 17 Negotiation Session**. A third negotiation session took place on September 17 at the Union hall. (Tr. 5:62.) Kahele was occupied in a meeting with

another employer and had intermittent involvement in the meeting with YLDC. (Tr. 1:221.)

71. At the meeting, Drace attempted to give Torres copies of YLDC's tax returns, but Torres refused to accept the returns. (Tr. 5:65.)

72. The parties agreed they were at an impasse, at least as to economic items such as wages and benefits, or "cost items." (Tr. 1:228, 243, 5:86-87.)

73. **Events Following the Impasse**. On September 23, 1998, YLDC wrote to the Federal Mediation and Conciliation Service advising them that the parties had reached an impasse and that YLDC intended to implement its last offer on October 1, 1998. (Ex. 1055.)

74. On September 25, the Union sought approval for strike benefits from the Teamsters Joint Council. Approval was sought because the parties were at an impasse and there was a likelihood of a strike if the impasse was not resolved. (Tr. 6:51.)

75. On September 25, the parties met before the federal mediator. At the conclusion of the meeting before the federal mediator, the Union finally agreed to have its accountant review YLDC's books.

76. During the meeting with the federal mediator and in the days following, the parties made additional proposals. None was accepted by both parties.

77. **Accountant's Statement to Kahele That YLDC Has No Money**. On September 28, the Union accountant, Terry Takaki, accompanied Kahele to YLDC's offices. (Tr. 2:103.) Drace provided them with several years of tax returns and consolidated financial statements. (Tr. 2:104.)

78. Drace testified that after looking at the tax returns, Takaki informed Kahele at the meeting: "I can tell you from what I have seen already, they don't have any money." (Tr. 4:48.) According to the testimony of Drace, Kahele responded: "That's not what I want to hear Terry." (Id.)

79. Drace's testimony that Takaki told Kahele that YLDC has no money is supported by the testimony of Chang. (Tr. 2:233.)

80. After Kahele was told by Takaki that YLDC had no money, Takaki and Kahele exited the room and began to talk outside of the presence of Drace and Chang. (Tr. 2:209, 235.) According to the testimony of Drace and Chang, upon returning to the meeting, Takaki made a twisting motion with his arm, and said to Unice Chang, YLDC's controller, that he felt that his arm was being twisted. (Tr. 4:48-49, 2:211.)

81. At trial, Kahele denied making the statement to Takaki that he did not want to hear that YLDC had no money.

82. While Takaki testified that he did not recall saying that his arm was being twisted, or Kahele saying that he did not want to hear YLDC did not have any money, the Court finds the testimony of Chang and Drace on these matters

persuasive. (Tr. 2:105-106.) Takaki saying that he felt his arm was being twisted, and Kahele indicating that he did not want to hear that YLDC was losing money, are consistent with the information provided and the positions of the parties and subsequent events.

83. Takaki testified that his company receives roughly eighty percent of its business from unions. Takaki's testimony that he did not recall the statements is likely attributable to his regret that the evidence speaks badly for his client. The Court is also persuaded by the fact that Takaki's recollection of the events occurring at the September 28 meeting was otherwise quite clear. Takaki remembered, for example, the topic of conversation with Kahele on the car ride from YLDC to the Union hall. As to whether he said that he felt like his arm was being twisted -- facts that would be detrimental to his client -- he had no recollection but did not deny they occurred.

84. The Court is persuaded by the testimony of Drace and Chang that Kahele said he did not want to hear that YLDC was losing money and that Takaki indicated that he felt like his arm was being twisted by the Union.

85. **YLDC's Financial Records**. Takaki and Kahele left YLDC with various financial records provided by YLDC, but Kahele never reviewed them. (Tr. 2:29-31.)

86. Only on September 25, 1998 did the Union agree to have Takaki, the Union's certified public accountant, review YLDC's books. (Tr. 2:27-28.)

87. On September 29, 1998, the day after Takaki was provided YLDC's financial information, Kahele instructed Takaki to stop working on the review of YLDC's records. (Tr. 2:43; Ex. 1084.) He told Takaki that the employees were infuriated by the company's proposal to roll back wages and would not listen to the Union's explanations of YLDC's position. (Ex. 1084.) Kahele testified that he believed the financial information on YLDC would be useless if the employees would not accept it, therefore, Kahele instructed Takaki to stop work. (Tr. 2:43; Ex. 1084.)

88. **Strike Authorization Vote**. The Union scheduled a strike authorization vote. On September 29, 1998, employees of YLDC voted 80-8 in favor of a strike.

89. The strike vote took place several hours after Kahele instructed the Union accountant to stop working on the company's financials. (Tr. 1:60-61.) At the strike vote, Kahele, as well as others, made statements that Drace was making money from Steam Press and that the Union was going to check on that. (Id.) Even though the accountant had been told not to review the financial records of YLDC, Kahele indicated to the YLDC employees that the Union accountant was going to check on the company's financial information. (Id.)

90. On October 2, 1998, the parties attended another meeting at the federal mediator's office, to no avail. (Ex. 17.)

91. **YLDC's Last, Final, and Best Offer**. On October 5, 1998, YLDC implemented its last, final, and best

offer which was identical to the September 10 proposal and called for a five percent rollback in wages.[3] (Tr. 5:57, 90; Exs. 1039, 1040.)

92. **October 6 Meeting**. The parties continued to exchange proposals until October 6, 1998. At a meeting held on that day at the Hungry Lion, a local restaurant, the parties again discussed their positions. (Tr. 7:81.) Drace explained that the cuts would amount to only a few dollars per month per employee and that the Union should explain to the employees that ninety-five percent of their pay is better than zero percent. Kahele responded that the employees did not care if the company went under; the employees wanted their pay raised. (Exs. 19, 20; Tr. 1:149.)

93. Drace testified that on October 6, 1998, Mr. Kahele said that there had been good progress, that he would convey that, and there would be no strike. (Tr. 5:52, 94-95.)

94. The Court finds that the Union did not orally agree not to strike. Drace's recollection of the statement by Kahele that "there would be no strike" was not a binding statement. The contemporaneous notes taken by several Union officials do not reflect an agreement not to strike. (Exs. 19, 20.) The references Kahele may have made regarding the likelihood of a strike did not amount to an intent to bind the Union to such a course of action.

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[3] Although Drace agreed, through his testimony, that the final offer was identical to the September 16 proposal, the Court finds that the date was stated in error, and that September 10 was the date of the relevant proposal.

95. At the conclusion of the meeting at the Hungry Lion on October 6, the parties agreed they were at an impasse. (Tr. 7:84.)

96. A meeting of YLDC employees took place on October 7. Bob Bruno, a Business Representative of the Union, testified that the employees were upset and indicated their intent to strike. (Ex. 1006; Tr. 5:161, 166.)

Strike From October 8, 1998 Until May 5, 1999

97. On October 8, 1998, the Union struck. (Tr. 3:193, 1:55.) Approximately 103 of the 148-150 bargaining unit employees struck. (Tr. 5:109.)

98. Striking workers began to picket the YLDC plant. (Tr. 3:11-12.) They continued to picket through the March 5, 1999 vote to decertify the Union, until the Union was decertified on May 5, 1999. (Tr. 8:12, 3:15, 3:33.)

99. The Union also distributed handbills, fliers, and press releases for roughly the first six to eight weeks of the strike. (Tr. 2:57-58, 76-78, 5:122-123; Exs. 1297, 1298, 1299.)

100. On October 9, 1998, the parties met before the federal mediator for further negotiations. (Tr. 7:86.) At that meeting, YLDC indicated it would accept a five percent rollback on wages for the following six months and a freeze on existing benefits. (Tr. 5:99.) The agreement was conditioned on the employees returning to work the next morning. (Tr. 5:99-100.)

101. Drace was allowed to pitch the final proposal directly to a group of YLDC employees. (Tr. 5:102.)

102. Striking workers did not return to work on October 10. (Tr. 5:103.) The strike continued through the decertification vote on March 5, 1999, until the Union was decertified on May 5, 1999. (Tr. 3:15, 33, 8:12.)

103. **Replacement Workers**. On October 10, 1998, YLDC hired approximately 140 replacement workers to fill the jobs opened by the striking workers. (Tr. 5:108-109.) One of Drace's primary hiring criteria for the replacement workers was whether they could handle passing through the picket lines each day. (Tr. 4:57.) Replacement workers were hired as permanent replacement employees. (Tr. 5:112.)

104. **Picketing**. Striking workers picketed in front of the YLDC plant beginning on the first day of the strike. The picketers caused substantial disruption to the ingress and egress of YLDC employees, including the replacement workers, and YLDC delivery trucks. Unice Chang testified that she was initially blocked from entering and department the premises for up to 30 to 45 minutes. (Tr. 3:11-12.) After the first few days of picketing, however, Ms. Chang was generally detained by the picketers for five to ten minutes. (Tr. 2:220.) Ms. Chang attributes the shortening of the delays at the picket line to the involvement of the police. (Id.)

105. YLDC hired a bus to transport the replacement workers to and from the YLDC plant in order to assist the

replacement workers' passage through the picket line. (Tr. 3:16-18.)

106. YLDC delivery trucks and vendors were also blocked by striking workers. (Tr. 3:18.) On one occasion, the United States postal delivery person was blocked from delivering the mail to YLDC. (Tr. 2:221.)

107. In addition to causing substantial disruptions to YLDC's operations, the picketing made YLDC's ability to retain replacement workers difficult. YLDC experienced substantial attrition in its ranks of the newly-hired replacement workers. (Tr. 5:110.) Picketers held various signs directed at, protesting the presence of, the replacement workers at YLDC. (Tr. 2:57.)

108. The picketing continued throughout the seven-month duration of the strike until May 5, 1999. (Tr. 3:15, 33.)

109. **Decertification**. On October 27, 1998, employee Jayden Sayvella filed a decertification petition with the National Labor Relations Board. (Tr. 7:97-98, 131.)

110. On March 5, 1999, the National Labor Relations Board conducted a secret ballot of the bargaining unit employees. (Tr. 7:98.)

111. YLDC provided the Union with an Excelsior List -- a list of employees eligible to vote on the decertification petition. The list included replacement workers, non-striking Union member workers and striking

workers who had not retired or found other permanent employment. (Tr. 5:121; Ex. 1220.)

112. On the day of the election, the Union challenged the eligibility of certain voters. (Tr. 7:98-99.) The majority of the eighty to ninety workers challenged were replacement workers. (Tr. 7:99.)

113. The National Labor Relations Board conducted a hearing regarding the challenges by the Union on April 8, 1999. (Tr. 7:102.) The Union's challenges were overruled. (Tr. 7:105.)

114. The Union was decertified on May 5, 1999. (Tr. 8:12.)

Unfair Labor Practices (Count I)

115. Plaintiffs have alleged that Defendants violated Section 303 of the Labor Management Relations Act by its efforts to induce or encourage a strike to coerce or force YLDC to assign work to striking YLDC employees to the detriment of replacement workers.

116. At the summary judgment stage, Plaintiffs had put forth evidence that the Union had taken the position that many of the replacement workers were not qualified to vote in the decertification election because they were "not in Unit." Plaintiffs' presentation of this evidence was sufficient to survive summary judgment because it demonstrated a genuine dispute as to whether striking workers and replacement workers were both represented by the Union.

(See Order issued October 5, 2000 denying Defendants' motion for summary judgment as to Count I.) The evidence at trial demonstrated, however, that striking workers and replacement workers were members of the same bargaining unit and were represented by the Union.

117. The striking YLDC employees were members of the bargaining unit and were represented by the Union until it was decertified. (Exs. 1001, 2003.)

118. The replacement workers were also members of the bargaining unit and were represented by the Union until it was decertified. (Exs. 1001, 2003.)

Defamation (Count III)

119. **September 11 Statements**. Plaintiffs allege that Defendants made certain defamatory statements. Specifically, Plaintiffs' claim that the Union told YLDC employees that Drace was making money and that he was hiding money in a separate entity called Steam Press.

120. Plaintiffs provided the testimony of Hannah Kilakalua, an employee with YLDC since 1982. On September 11, 1998, Kilakalua attended a meeting outside the plant near the dumpster on YLDC's premises at which she testified Kahele spoke to "over 40 or 50" YLDC employees.[4]

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[4] On November 14, 2000, Kahele estimated that he spoke to two groups of approximately 30 people each. (Tr. 6:42, 6:46.) On October 31, 2000, Kahele testified that he spoke to approximately (continued...)

(Tr. 1:58.) Kilakalua came early to the meeting, and left when her ride came. Kilakalua testified that Kahele stated at that meeting that "Mike was making money," (Tr. 1:57) and "[Y]es, Mike Drace is making money from the Steam Press." (Tr. 1:70.) Kilakalua and the other employees gathered at the September 11 meeting understood from Kahele's statements that Drace and YLDC were making money and hiding it in Steam Press. (Tr. 1:58-59.)

121. Drace also testified that on September 14, 1998, Bernard Roque, a shop steward and a member of the Union negotiating team, was at the September 11, 1998 meeting at the dumpster and stated to Drace that he had resigned from the negotiating team after hearing that YLDC was hiding $7 to $10 million dollars "because these people are crazy." (Tr. 5:128.) Kahele's testimony confirms that Roque was at the September 11, 1998 meeting. (Tr. 6:45.) Kahele also testified that Roque asked to see the D&B Report that Kahele had brought to the September 11, 1998 meeting, that Kahele showed him the report, that Roque reviewed the report for approximately 5 minutes, and then returned the report to Kahele. (Tr. 6:45-46.) The Court is unclear as to whom Roque allegedly referred to as "crazy" but notes that, according to the testimony of Drace, he did state that he heard at the September 11 meeting that Drace was hiding $7 to $10 million.

122. The employees at the September 11, 1998 meeting reacted angrily at the news that Drace was making

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(...continued)
80 employees in "several groups." (Tr. 1:239.)

money. Immediately after being informed that they were being asked to take a five percent rollback in pay as well as other concessions, the Union's agent, Mel Kahele, told YLDC employees that Mike Drace was secretly hiding money. Upon being told that Drace was requesting employee concessions despite the fact that he was hiding money, YLDC employees reacted with frustration and anger. Kilakalua overheard other employees at the meeting calling Drace a "son of a bitch" and expressing their anger that he would hide money while they were working so hard. (Tr. 1:58.) Drace and YLDC were treated as the same by the employees because Drace was the President and sole owner of YLDC.

123. Defendants provided the testimony of Kahele that he stated at the September 11 meeting that YLDC had *sales* of $5 to $7 million. (Tr. 1:237-238, 6:44.) Kahele also testified that he asked the employees present at the September 11 meeting whether they had ever heard of Steam Press. (Tr. 6:43.) Defendants claim Kahele did not say that Drace was making money or hiding money, but the contention is not consistent with Kahele's other statements or testimony of other witnesses. (Tr. 6:44-49.)

124. The Court finds that Kahele stated at the September 11 meeting that Mike Drace was making money and that he was hiding the money in Steam Press. The Court finds the testimony of Kilakalua credible and that Kahele made these statements.

125. The Court is also persuaded by the testimony of Drace on two separate trial days relating to the events that occurred at a September 17 negotiation meeting. Drace

testified that he directly asked Kahele what he had told the employees on September 11. (Tr. 5:69, 3:117.) Drace testified that Kahele answered that the Union had information that YLDC had money, had another company, that the sales were $7 to $10 million, and that YLDC was making money. (Tr. 5:69, 3:117.) Drace asked where Kahele was getting his information because the Union had still not looked at YLDC's books. (Tr. 5:69, 3:117.) Kahele's response was that the Union had its own sources and he did not need to look at the company's books. (Tr. 5:69, 3:117.) Soon after making this statement, Kahele threw the D&B Report onto the table, indicating that to be his source, and left the room. (Tr. 5:70, 3:117-118.) After Kahele returned to the room, Drace asked Kahele what he told "the people," and Kahele responded, "I told 'em you're making money." (Tr. 3:119, 5:71.) Drace testified that Kahele said he told the employees that YLDC was hiding money. (Tr. 5:72.)

126. Kahele's statements at the September 17 meeting that YLDC was making and hiding money is consistent with Kilakalua's testimony that six days earlier Kahele told employees that Drace was making and hiding money.

127. Drace's testimony that, on September 14, 1998, the Monday after September 11, 1998, he was treated very coldly by many of his employees who previously treated him warmly, further supports the finding that defamatory statements were made against Drace prior to September 14, 1998. (Tr. 3:48-54.) Specifically, Drace testified that prior to the strike, he "had an excellent relationship with the employees." (Tr. 3:46.) He would walk around and communicate a "friendly good morning, smiles, you know,

how's-the-wife-and-kids sort of thing." (Tr. 3:48.) "I knew all the people." (Tr. 3:49.) On September 14, 1998, however, "the situation had turned to ice. The smiles were gone. The greetings were gone. I could tell something was wrong." (Tr. 3:49.)

128. Defendants have argued that YLDC's notes from the September 17 meeting indicate that Kahele only said he told employees that YLDC had projected sales of $7 to $10 million. This evidence, however, is not inconsistent with Drace's testimony and does not contradict the Court's finding that Kahele told YLDC employees that YLDC was making money. Drace testified that, at the September 17 meeting, Kahele said he told employees that YLDC had sales of $7 to $10 million. (Tr. 5:68-71.) The additional statements attributed to Kahele by Kilakalua and Drace are not inconsistent with his telling employees that YLDC was making and hiding money.

129. The Court is not persuaded by Kahele's testimony that he only told employees that YLDC had sales of $5 to $7 million at the September 11 meeting. This statement is self-serving. Kahele testified that he took the projected sales figure of $7 million from Dun & Bradstreet and took the low end ($5-7 million.) (Tr. 6:49.) Drace testified more believably that Kahele told him Kahele came up with $10 million by adding the sales from other stores to the $7 million in sales from the main plant as reported in the D&B Report. (Tr. 3:127-128; Ex. 1031.) "He took $7 million as the main plant; he took the stores that are listed in the Dun & Bradstreet and added them to there, and he guessed at the remaining stores -- I think he said 18 . . . . And he added

those and came up with the $10 million total sales estimate." (Tr. 3:127-128.) Kahele's inability to remember particular details relating to the negotiations and events leading up to the strike of YLDC employees diminishes his credibility with respect to limited items he claims to remember. While on the stand, Kahele was repeatedly plagued by the inability to remember details of the events occurring at the negotiation sessions. Kahele's inadequate memory causes this Court to discount his recollection of the events occurring at the September 11 meeting. The Court finds that Kahele told the employees present that Drace and YLDC had sales of $7-10 million.

130. The Union's statements that Drace was making money and hiding it in Steam Press were false. The evidence clearly demonstrates that YLDC was losing substantial amounts of money as of September 1998. (Tr. 2:214-15; Exs. 1028, 1060.) The fact that YLDC and Steam Press had an income does not make the statement that they were "making money" true. The statement that an entity is making money must necessarily consider the entity's costs and liabilities. A company that has greater expenses than income is not "making money."

131. The clear effect and intention of the statements Kahele representing the Union at the September 11 meeting was to give the impression to YLDC employees that YLDC and Drace were profitable and yet, Drace was attempting to ask for concessions relating to employee compensation.

132. The Union's statements angered YLDC employees. Their anger was compounded by the fact that

they had accepted compensation concessions four years earlier and had hoped to recover those concessions if YLDC were to recover financially. The Union led the employees to believe that YLDC had recovered financially but Drace was attempting to hide this fact from them. This caused anger and distrust of YLDC management. (Tr. 1:59-68, 3:160-62.)

133. Drace noticed a marked difference in the mood of the employees on the Monday following the September 11 meeting. Employees usually greeted Drace with smiles and asked how he was doing. After the rally at which the employees were informed by the Union that Drace was hiding money from them while asking for wage and benefit concessions, the employees' attitudes toward Drace turned to ice. (Tr. 3:46-49.)

134. On the Monday following the September 11 meeting, Drace learned from the production manager, Scott Tobias, who was the boss of Kilakalua (Tr. 1:72) that the Union had told YLDC employees at the rally that Drace was making money through Steam Press. Tobias came to Drace's office and "said that we had a big problem; that the workers were totally upset; that the union had told them on Friday evening that I was hiding money in a separate corporation, and the rumor, first thing in the morning, was, as much as $27 million hiding in a separate corporation; and that the people were just totally upset." (Tr. 3:51-52, 112.) Drace learned that the Union told the employees that Steam Press was a separate corporation that was hiding $7 to $10 million dollars. (Tr. 3:51-53.) On September 14, Drace spoke with Kilakalua to ask what she had been told. After Kilakalua explained what occurred at the September 11 meeting, Drace

told her that it was not true and that he was not making money. Kilakalua did not believe Drace. (Tr. 1:72.)

135. The rumors of the amount of money Drace was hiding in Steam Press rose to $27 million. (Tr. 3:51-52.) This rumor gained force and grew out of the statements of the Union at the September 11 meeting.

136. Drace wanted to convince his employees that what the Union had told them was untrue. Upon learning of the content of the September 11 meeting, Drace located a letter that he had written in 1997 to all employees. That letter welcomed YLDC employees as stockholders in Steam Press as part of an employee stock ownership plan. Drace wanted to remind YLDC employees that Steam Press was not a secret corporation that was used to hide money but that Steam Press was simply a holding company set up in part to allow employees to have an equity interest in the company. (Tr. 3:52-53.)

137. Drace testified that he was not hiding money, and that Steam Press was not a secret corporation, but a holding company for the stock of YLDC, allowing the company to have an employee stock ownership plan. (Tr. 3:53.)

138. Drace also tried to convince YLDC employees that the Union's statements were not true by posting a contest, "kind of a put-your-money-where-your-mouth-is contest, and [Drace] challenged the union to find the money, and if they could find it, [he] would split it with the employees." (Tr. 3:53.) Drace offered a $10,000 bonus to every employee if

the Union could find the "hidden" funds. (Id.) Drace also said that if the Union could locate the funds, he would accept the Union's proposed wage and benefit increases verbatim. (Id.) Drace explained that he organized the contest "to dramatize the fact that [the information from the Union about profits and hiding money] was a ridiculous rumor." (Id. at 54.)

139. Kilakalua, a YLDC employee, testified that she did not believe Drace when he attempted to correct the false statements made by the Union. (Tr. 1:72.) She testified that she believed what the Union told her to be true. The Court finds that Kilakalua's reaction to the statements made by the Union reflected the reaction of other bargaining unit employees. (Tr. 3:163.) The Union is the lawful representative of YLDC employees in matters relating to employment conditions. The Union, as the employees' bargaining agent, holds the trust of YLDC employees. YLDC employees accepted as true the Union's statements that YLDC was making money and hiding it in Steam Press.

140. The Union had been on notice that YLDC had been claiming financial difficulties for some time prior to the September 11 meeting with YLDC employees. Kahele testified that he saw an October 1, 1997 memo from Drace to all YLDC employees explaining that the company is "not financially strong enough to do both, pay the extra health care costs and restore the vacation schedule . . . ." (Ex. 1004; Tr. 1:122-123.) Kahele testified that as of the September 2, 1998 negotiating session, he had no reason to question Drace's honesty and integrity with respect to his statements about YLDC's financial condition. (Tr. 1:125.)

141. Despite Drace's repeated statements that YLDC was experiencing financial difficulties in July and August of 1998, Kahele did not have an accountant review of YLDC's books at that time. (Tr. 1:145). Kahele testified that he was given at least three opportunities to have a certified public accountant look at YLDC's actual financial records, but made the decision, with the committee, not to review them. (Tr. 1:196.) Drace actually brought copies of his charts, a budget comparison and an analysis report to a meeting and gave them to Kahele. (Tr. 1:197.) Kahele testified that he made a deliberate decision not to have an accountant review YLDC's books because the employees of YLDC were adamant that they receive wage increases. (Tr. 1:149.) Such a refusal to review YLDC's book is evidence of Defendants' reckless disregard as to the truth or falsity of their defamatory statements.

142. On September 2, 1998, Drace made a presentation to the Union in which he detailed through charts the company's financial difficulties. Kahele was present at this meeting and took notes. (Ex. 3, 1028; Tr. 1:156.) The notes indicated, and Kahele testified, that Drace informed him the dry cleaning business is shrinking throughout the State of Hawaii and that YLDC and its low-cost competitors are going to desperate measures in an attempt to maintain their sales. (Tr. 1:164-165.)

143. Kahele received the D&B Report on the afternoon prior to the meeting at which he told YLDC employees that Drace was making money. (Tr. 6:39.) Kahele testified that he reviewed the D&B Report for

approximately 15 to 20 minutes before speaking at the meeting. (Id.)

144. As described above, the D&B Report did not contain positive information about YLDC's financial health. In fact, the D&B Report contains numerous indications of YLDC's poor financial health. Attached articles from the Honolulu Star-Bulletin dated April 22 and May 19, 1998 contain information that YLDC recently had to let 65 of its 200 employees go because of a "major setback" in losing the military contract which it had held since 1982. (Exs. 1031 at 123146, 123147.[5]) A printout from Dun's Market Identifiers dated April 20, 1998 states that YLDC has weathered a twenty percent decrease in the number of employees between three years ago and one year ago. (Id. at 123157.) A printout regarding YLDC's "rate change" indicates a "fair" credit appraisal based on indications of "slowness in meeting trade obligations and this company's number of years in business." (Id. at 123148.) A section entitled Payment Summary states that YLDC's payments to suppliers average 22 days past due, and only approximately sixty-one percent of its payments are on time. (Id. at 123149.)

145. The documentary and testimonial evidence shows that the Union acted with a high degree of awareness of the probable falsity of the truth of the statements that Drace was making money and that he was hiding money in Steam Press. Defendants have put forward no evidence to indicate that Kahele acted upon a reasonable belief that his statements

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[5] All exhibits beginning with "12" were produced to Plaintiffs from the Union's files. (Tr. 7:114.)

were truthful. Plaintiffs have met their burden through clear and convincing evidence. The evidence demonstrates the Union was on notice of YLDC's financial woes, and that the Union had no reason to believe that YLDC was profitable or that Drace was hiding money in Steam Press. In fact, the evidence before the Union was that, as was the case in years prior, YLDC was experiencing financial difficulties. Furthermore, the Union ignored repeated offers to review YLDC's financial information. Torres and Kahele admitted on September 10 that neither knew what Steam Press was. Despite YLDC's explanation on September 10 that Steam Press was merely a holding company set up to invest the profits of YLDC, the Union recklessly informed YLDC employees that Steam Press was a vehicle to hide YLDC profits. The evidence demonstrates that the Union was provided information prior to September 11 demonstrating YLDC's poor financial condition. Plaintiffs have met their burden through clear and convincing evidence. The Union acted with malice in making untruthful statements to YLDC employees on September 11 while being aware of the probable falsity of the statements.

146. **September 17 Statement**. A negotiation session took place on September 17, 1998 at the Union hall. At that meeting, negotiations became heated. After throwing the D&B Report onto a conference table, Kahele exclaimed "I know you [YLDC] are profitable." While this statement is consistent with Kahele's previous representations to the employees, standing alone, it would not necessarily be defamatory. Standing alone, the statement could have been one of opinion and not reasonably understood by the listeners as one of fact. The statement was made in the context of

labor negotiations — a situation in which one would expect opposing sides to take bargaining positions. Kahele's statement that YLDC was profitable in this context could be understood by the listeners as a statement of opinion made in the course of posturing during negotiations. Kahele's statement was not defamatory in the context of the negotiations between the meeting parties.

147. The first time Drace knew that the Union had a D&B Report was at the September 17, 1998 meeting. (Tr. 3:98.)

148. **September 29 Statements**. YLDC bargaining unit employees gathered on September 29 to vote on whether they planned to strike. At that gathering Kahele and Soria spoke to the employees. As of September 15 or 16, 1998, Soria was a shop steward and acted as an agent of the Union. (Tr. 4:63.)

149. Kilakalua testified that, at the September 29 meeting, Kahele and Soria again told YLDC employees that Drace and YLDC were making money and hiding it in Steam Press. (Tr. 1:60.) According to the testimony of Roberta Ann Mero, a receptionist /telephone operator at the Union (Tr. 3:147), the Union told the employees before the strike vote that they believed Drace was doing better financially than he had been telling the Union and that they did not believe he was broke. (Tr. 3:162-63.)

150. The Union's statements at the September 29 strike vote were false. The clear evidence demonstrates that

YLDC was financially enfeebled and that Drace had been truthful in outlining to the Union his financial difficulties.

151. The Union acted with reckless disregard for the truth of its statements. The Union had no evidence that Drace was doing better financially than he had repeatedly explained. It has no evidence that YLDC was making money and hiding it in Steam Press. The only information presented to the Union indicated the contrary — that YLDC was troubled financially. Further, the Union ignored repeated offers to review YLDC's financial information. Hours before the strike authorization vote took place, Kahele instructed the Union accountant to stop reviewing YLDC's financial information. The Union's willful blindness demonstrates through clear and convincing evidence that it acted with reckless disregard as to the truth of the statements on September 29 prior to the strike vote.

152. **Effect of Defamatory Statements**. The direct effect of the Union's September 11 false statements was to lower Drace's esteem in the eyes of YLDC employees and the community. The evidence is undisputed that prior to the defamatory statements Drace was well regarded by YLDC employees and that he had a reputation for honesty and integrity. (Tr. 1:90, 2:222-223.) After the Union's September 11 false statements, Drace was viewed as one who was attempted to hoard money to which YLDC employees believed they were entitled. The mood at the YLDC plant was markedly different on the first day back in the office after the Union's September 11 false statements. Drace was unable to regain the trust of the employees despite his best efforts.

153. One effect of the September 11 and September 29 defamatory statements was the striking of YLDC employees. Immediately before taking a strike vote, YLDC employees were told for a second time the falsehood that Drace was making money and hiding it in a corporation known as Steam Press. The effect of these statements being put forth by the employees' lawful collective bargaining representative moments before the strike vote was clearly to motivate the employees to vote to strike. The employees' distrust of Drace and anger at the thought that he was hiding money despite his requests that they make additional concessions caused the strike vote to result in 80 in favor and only 8 opposed. The subsequent strike that flowed from the vote was directly caused by the misinformation put forward by Kahele and the Union.

154. Drace also experienced emotional distress as a direct result of the strike. For 7 months, Drace had to endure crossing the picket lines and addressing problems in the line. (Tr. 3:195.) Drace testified that it hurt him to see the picket line, and that it was also "downright scary." (Tr. 3:198.) Drace moved into the business headquarters because he feared that there would otherwise be damage done to it. (Tr. 3:199.) Drace hired a security guard to help him guard the plant against damage, for about $1,000 a week. (Id. at 199-200.) He had trouble sleeping, and experienced loss and graying of hair, and crankiness. (Id. at 204.)

Breach of the Collective Bargaining Agreement (Count VI)

155. Plaintiffs allege that Defendants are liable for

breach of contract. They allege that Defendants orally agreed not to strike and the strike of October 8 was a breach of this agreement.

156. Plaintiffs also allege that the Master Laundry Agreement was in effect as of October 8 and that Section 29 of the MLA prohibits strikes while the agreement is in force. The October 8 strike, according to Plaintiffs, was a breach of Section 29 of the MLA.

157. **Oral agreement not to strike**. Defendants are not liable for breach of an oral agreement not to strike. The Court finds that Kahele's statement at the October 6 meeting at the Hungry Lion that "there would be no strike" (Tr. 4:52) does not constitute an agreement not to strike. The contemporaneous notes taken by Union officials do not reflect an agreement. (Exs. 19, 20.) The evidence does not support a finding that the Union intended to bind itself to such a course of action. Accordingly, Plaintiffs are unable to recover for an alleged breach of an oral agreement not to strike.

158. **No Strike Clause of the Master Laundry Agreement**. Section 29 of the Master Laundry Agreement states:

> The parties hereto agree that during the term of this agreement there shall be no lockout by the Employer, nor any strike, sitdown, refusal to work, stoppage of work, slowdown, retardation of production, or picketing of the Employer on the part of the Union or its

representatives or on the part of any employee covered by the terms of this agreement.

159. This Court has found that the duration of the MLA was not modified by Paragraph 3 of the Memorandum of Agreement. Therefore, by its own terms, the MLA would continue to be in effect after the MOA expired on September 30, 1998.

160. Defendants correctly argue, however, that with respect to the Plaintiffs' claim for breach of the collective bargaining agreement (the MLA), Plaintiffs are estopped from arguing that the MLA continued to be in force because they had repudiated it prior to the beginning of the strike on October 8, 1998.

161. On September 15, 1998, YLDC sent a letter to the Union in which it indicated that the MLA was no longer in effect. (Ex. 1044.) YLDC expressly stated that "the only agreement in effect at all is the Memorandum of Agreement that expires at the end of this month." (Id.; Tr. 5:36.) The letter also stated that the only existing agreement -- the MOA -- does not contain a no-strike clause. (Ex. 1044; Tr. 5:37.)

162. YLDC submitted to the Union a new proposal on September 16. The proposal only included economic terms. The proposal differed from the proposal submitted on September 10, 1998, in that the September 16 proposal omitted all references to the MLA. Whereas the September 10 proposal indicated that the MLA continued to be in force, the September 16 proposal indicated that only the 1994 MOA was in effect. (Ex. 1047.)

163. On September 25, 1998, a negotiation session was held at the office of the Federal Mediator. (Tr. 2:26.) The meeting began with a discussion regarding whether both the MLA and the MOA continued to be in effect. (Tr. 7:73.) YLDC took the position that only the MOA was in effect and that the non-cost provisions of the MLA ceased to be in existence. (Id.)

164. At the September 25 meeting, YLDC clearly indicated that it did not believe the MLA to be in effect. YLDC conditioned its acceptance of the non-economic terms contained in the MLA upon the Union's acceptance of YLDC's September 16 proposal, which contained the five percent rollback in wages. (Ex. 1068 paragraph 3.) YLDC demonstrated that the question of whether the MLA was in effect was disputed by the parties. Jossem told the Union: "If you believe that the MLA is in effect and you go out on the strike, it's illegal, and you will be liable for damages." (Tr. 5:45.) The fact that Jossem expressed his statement in terms of what the Union may "believe" indicates that the continued existence of the MLA was disputed.

165. By the conclusion of the September 25 meeting before the federal mediator, Drace testified that YLDC had accepted the majority of the non-economic terms of the MLA. (Tr. 5:37-38, 44-45.)

166. On September 28, Torres sent a letter to YLDC stating that it was the Union's understanding, following the September 25 negotiation session at the office of the Federal Mediator, that the MOA together with the MLA were still in effect. (Ex. 1077.)

167. YLDC responded to Torres's September 28 letter by stating that the Union's understanding as to the governing documents was not correct. Jossem indicated that "there is no Master Laundry Agreement in effect." (Ex. 1079.) His letter also stated that it would be a "judicial error" for a court to find the MLA to continue to be in effect. (Id.)

168. At trial, Drace testified that YLDC's position in September 1998 that the MLA was no longer in effect was merely a negotiating position. (Tr. 5:35-38.) He maintained YLDC took that position to effect a favorable negotiation from the Union. (Id.)

169. The Court finds that YLDC's repeated indications that the MLA was not in effect as of September 1998 amounted to a repudiation of the MLA. YLDC was clear that only the MOA remained in force and indicated such beginning on September 15. Although Drace testified that YLDC accepted the non-economic terms of the MLA at the negotiation session before the federal mediator on September 25, 1998, YLDC retreated from this position in the letter dated September 29, 1998, in which Jossem stated that the MLA was no longer in effect and any finding to the contrary would be judicial error. The Union reasonably believed this to be YLDC's belief rather than merely a negotiating position during the negotiations in the latter part of September and early October 1998. YLDC is estopped from arguing that the MLA was in effect as of October 8, 1998.

170. Accordingly, the Union was not in breach of the no-strike clause of the MLA. YLDC's conduct was a clear

repudiation of that agreement and Plaintiffs are estopped from asserting that the MLA was breached.

Damages

171. As a direct result of the Union's defamatory statements of September 11 and September 28, 1998, and the resulting strike of YLDC employees beginning on October 8, 1998, Plaintiffs Drace and YLDC were damaged.

YLDC's Damages

172. As a direct result of Defendants' defamatory statements, YLDC suffered damages flowing from the strike beginning on October 8, 1998.

173. **LOSS OF PRODUCTIVITY**. Approximately 103 to 108 bargaining unit employees struck against YLDC on October 8, 1998. (Tr. 3:194, 205, 5:109.) Only approximately one-third of the bargaining unit employees continued to work. (Tr. 5:109.) As a result, YLDC was forced to hire approximately 140 replacement workers to fill the positions vacated by striking workers. (Tr. 5:109.) The replacement workers were unskilled and as a result more people were required to do the work of the striking workers. (Id.; Tr. 3:206.) As a result of being forced to hire unskilled and untrained workers, YLDC experienced losses in productivity. (Tr. 5:109.) There was high turnover of the replacement workers for the first nine months of the strike, while the picketing occurred, which further contributed to the loss in productivity. (Tr. 5:110.)

174. The Court agrees generally with the methodology adopted by the parties to determine YLDC's loss of productivity. Loss of productivity is calculated by the net increase in the cost of labor as a percentage of total sales. (Tr. 8:58-59.) Specifically, the post-strike cost of labor as a percentage of sales, less the pre-strike cost of labor as a percentage of sales, multiplied by gross post-strike sales yields the loss in productivity. (Id.)

175. In calculating the pre-strike cost of labor as a percentage of sales, both parties rely on the 18-week period prior to the strike as the baseline for calculating productivity losses. (Tr. 8:58.) Use of the 18-week period prior to the strike is appropriate, as that period is the only period that reflects YLDC's cost of labor after two significant changes to YLDC's income stream, particularly, the loss of the military contract and the acquisition of additional retail outlets. (Tr. 3:210-211.) The Court finds the use of data from the 18-week period prior to the strike to be an appropriate baseline for labor costs. The cost of labor for production and non-production employees for the 18 weeks prior to the strike was 48.2% of total sales. (Exs. 1270, 1274; Tr. 3:211.) The cost of only production labor for the 18 weeks prior to the strike was 21.4% of total sales. (Kazenski's final Expert Report at 2, Ex. 1274.)

176. The parties disagree over the calculation of other components in the equation for loss of productivity. The disagreements are based on a difference in methodology between the parties. Based on the following, the Court adopts Defendants' methodology in calculating loss of productivity.

177. **Production Versus Non-Production Labor.** The parties dispute which labor costs should be included in calculating labor costs as a percentage of sales. YLDC asserts that all labor costs, production and non-production, should be considered. (Tr. 3:209.) Defendants argue that only production line labor costs should be considered, to more accurately reflect the employer's claim for damages – specifically, the loss of labor efficiency due to the use of less skilled workers. (Tr. 8:60-61; Kazenski's final Expert Report at 3, Ex. 1274.)

178. There is evidence that the replacement workers were unskilled, and that the replacement workers required time to reach the same level of productivity as the striking workers, such that more replacement workers than Union workers were required to do production jobs. While there was some evidence that the administrative staff had more work to do with the staff turnover, the difference does not rise to the level of having to be included in the calculations. There was no credible evidence that there was a loss of productivity involving other non-production workers. There is no reason to believe, for example, that YLDC had to hire greater numbers of administrative staff or counter workers than had been hired prior to the strike. The Court adopts the position of the Defendants that the damages for loss of productivity should be measured based upon the production workers only.

179. The parties also disagree over the methodology of calculating post-strike productivity and duration over which to calculate loss of productivity.

180. **Productivity Post-Strike**. YLDC measures the labor productivity of all workers for the entire 52-week period following the October 11, 1998 strike. According to the testimony of Drace, the post-strike cost of production and non-production labor as an average percentage of gross sales is 51.6%.[6] (Tr. 3:211.)

181. Defendants believe Plaintiffs' approach is flawed. Defendants label the data points in the four weeks immediately following the strike as "outliers," or non-recurring events, which should not be used in the measurement of the long-term question of when productivity had returned to normal, or in the measurement of average post-strike cost of labor. (Kazenski's final Expert Report at 1, Ex. 1274; see also Tr. 8:60.) Defendants believe that if found liable, they should pay separately for the loss of productivity during the "outlier" period during which the cost of labor to sales ratio is unusually high.(Id.) Defendants submit that, calculated separately, the increased cost of labor associated with the four weeks immediately following the strike is $67,677.[7] (Id.; Tr. 8:89-90.)

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[6] Plaintiffs state in their Proposed Findings of Fact and Conclusions of Law that the post-strike cost of all labor to sales is 53.1%, but do not provide evidentiary support for the higher figure. (Pl. Findings of Fact and Conclusions of Law ¶ 17.1.

[7] The Court notes that the total of the amounts for each week in the outlier period is $67,667 rather than $67,677. The Court has no information upon which to determine whether the error lies in the amounts for the outlier weeks or in the total for the four weeks.

(continued...)

182. The Court adopts the Defendants' position as being the more accurate approach. The outliers should be excluded in calculating the average post-strike cost of labor, and then added back in to a calculation of loss of productivity for the four weeks directly following the strike.

183. **Duration of Loss of Productivity**. Defendants contend that 52 weeks after the strike is too long of a period to recover lost profits. (Kazenski's final Expert Report at 2, Ex. 1274.) Defendants argue that Plaintiff should only recover lost profits through April 18, 1999 as the production labor cost to sales ratio (rather than the production and non-production labor cost to sales ratio) returns to pre-strike levels by that time. (Id.) The Court finds the loss of productivity related to the inefficiency of replacement workers lasted until approximately April 18, 1999, as illustrated by Defendants' expert Dr. Kazenski. (Id.) Accordingly, the post-strike ratio of production labor costs to sales in the period of October 11, 1998 through April 18, 1999 is 23.6%, compared to the corresponding pre-strike ratio of 21.4%.

184. **Calculation of Loss of Productivity**. Using only production labor costs in determining the labor to sales ratios, excluding the "outlier" data in determining the average labor to sales ratio and in determining when productivity returned to pre-strike levels (April 18, 1999), and adding back in the four-week period of lost profits just following the strike ($67,677), the total amount of damages for loss of

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(...continued)
Plaintiffs have not contested that the four-week total is $67,677.

productivity is, as calculated by Defendant's expert, $121,332. (Kazenski's final Expert Report at 1, Ex. 1274, as corrected by Kazenski trial testimony on cross-examination at Tr. 8:88-91.) The Court awards this amount to Plaintiff YLDC and finds the amount to fairly and adequately compensate Plaintiff YLDC for the damage due to loss of productivity.

185. **LOST PROFIT ON RETAIL SALES**. Plaintiff is entitled to recover for the profits lost on retail sales as a result of the strike. The parties agree that the appropriate method for calculating lost profit on retail sales is the contribution to margin / lost contribution margin approach. (Tr. 8:64, 65.) Under this method, the contribution margin equals the percentage of total costs less variable costs. The parties agree that the contribution margin percentage is multiplied by the estimated loss of gross sales to yield lost gross profit.[8]

186. The parties do dispute which variables are appropriate to be included in calculating the lost profit on retail sales. Specifically, the parties dispute (1) which costs are fixed and which are variable for purposes of calculating the contribution margin, (2) what would have been the estimated gross sales had the strike not occurred, and (3) the duration for which sales slumped as a consequence of the strike.

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[8] The parties do not discuss or include calculations of the Hawaii General Excise Tax.

187. **Variable Costs Versus Fixed Costs**. The Court reviewed Plaintiffs' calculation of variable costs (31% of total costs[9]) and Defendants' calculation (50.19%[10]) and determines that the actual figure should be 40% to accurately reflect the evidence presented at trial.

188. The foregoing discussion of labor costs, as a percentage of gross sales, suggests that roughly one-half of Plaintiff YLDC's costs were labor costs. YLDC's labor force is divided into production workers at the plant, administrative staff, delivery drivers, counter clerks, janitors, and engineering/ maintenance personnel.

189. **Labor Costs**. Defendants contend that all production labor costs, which were 33.11% of total costs, are variable costs. (Tr. 8:70; Kazenski final Expert Report at 5, Ex. 1274.) Drace's calculation of production costs as a percentage of total costs is 31%. (Tr. 3:214.) This percentage does not include some categories of labor costs.

190. Plaintiff established to the satisfaction of the Court that some percentage, albeit small, of the labor costs labeled production labor and included in the 33.11% calculation, are not in the variable cost category; the janitors and engineers/ maintenance workers are not to be a part of variable costs. For example, Drace explained at trial: "The janitor has to clean up the restroom three times a day, whether we have 100 employees or 120 employees." (Tr.

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[9] Tr. 3:214.

[10] Tr. 8:116.

8:157.) The Court finds the variable labor cost percentage to be 32%.

191. **Non-Production Costs**. The parties were in substantial agreement that certain non-labor costs are also variable costs. Supplies, consisting of 4.36% of the total costs, are variable costs. (Tr. 8:113, 157; Kazenski final Expert Report at 5, Ex. 1274.) Likewise, the utilities, which comprise 3.60% of total costs, are agreed to be variable costs. (Tr. 8:113, 157-158; Kazenski final Expert Report at 5, Ex. 1274.)

192. The Court does not find delivery payroll, which is 5.76% of total costs, to be a variable cost. (Tr. 8:113, 156; Kazenski final Expert Report at 5, Ex. 1274.) Half empty or full, the trucks must make their rounds for pickup or delivery of items from each store. (Tr. 8:156.) As Drace testified: "The truck costs just as much, in terms of depreciation and gas, to drive whether it's full or empty." (Id.)

193. The Court also finds sales expense, at 3.37%, to be a fixed cost. (Tr. 8:113; Kazenski final Expert Report at 5, Ex. 1274.) Drace testified that although sales expense decreased with the loss of sales, "it was because of a loss of funds, not because of some function of the work that was involved. We were not advertising as much as we should, because we were out of money." (Tr. 8:158.) The Court finds credible the position of Drace that advertising, which is the largest component of sales expense, decreased due to lack of funds rather than a lack of need, and that sales expense is generally a fixed cost. (Id.)

194. The Court reaches the total of 40% for variable costs by adding supplies (4.36%), utilities (3.60%), and 32% for production labor for a total variable cost percentage ratio of 39.96%, and rounds it to 40% to establish fixed costs at 60% of the total costs.

195. **Estimated Gross Sales Had the Strike Not Occurred; Duration of the Slump**. The parties also dispute the estimated gross sales had the strike not occurred. The appropriate formula for determining estimated gross lost sales is as follows: Weeks of recoverable sales multiplied by (average pre-strike weekly sales minus average post-strike weekly sales).

196. Plaintiff calculates projected sales based on the average weekly retail sales for the 18-week period preceding the strike. The average weekly sales for the 18 weeks preceding the strike was $54,266. (Tr. 3:214.) Plaintiff extends the estimated gross sales affected by the strike to the 86-week period following the strike. (Tr. 3:214.)

197. According to Plaintiff, YLDC could have expected to continue to make $54,266 — the average pre-strike yields — for the 86-week period following the strike. Using the formula, 86 x ($54,266 - $43,103), Plaintiff claims it has an estimated gross lost retail sales of $960,018.

198. The Court relies on the 18-week period preceding the strike as a baseline of YLDC's expected weekly sales. Although the Court recognizes Defendants' objections to using such a short time period as a baseline, the Court finds

the sales during that period to accurately reflect YLDC's expected retail income.

199. The Court also finds a 52-week period, rather than Plaintiff's suggested 86-week period, following the strike to be an appropriate and adequate duration in which to calculate losses resulting from the strike beginning October 8, 1998. The strike lasted 7 months. The Court is persuaded by the testimony of Dr. Kazenski and by the evidence of weekly sales per retail outlet (Ex. 1271) that Plaintiffs' sales stabilized and substantially returned to pre-strike levels at or near one year following the strike. Any loss of sales beyond 52 weeks cannot be determined with any degree of certainty to flow from the strike of YLDC employees and not as a result of other market forces. Plaintiff is only entitled to recover for damages on lost profit for the 52-week period following the strike.

200. The average weekly retail sales for the 52-week period following the strike is $43,461. (Ex. 1271, "Source Data B & C".) Applying the formula 52 x ($54,266 - 43,461), Plaintiff's estimated gross lost sales are $561,860.

201. Reducing Plaintiff's estimated gross lost sales by the contribution margin (Plaintiff's fixed costs) yields Plaintiff's loss of gross profit on retail sales. Therefore, $561,860 x 60% yields Plaintiffs $337,116. Plaintiff is entitled to this amount as lost profit on retail sales. The Court finds such an award to fairly and adequately compensate Plaintiff for the lost profit on retail sales.

202. **LOST PROFIT ON COMMERCIAL SALES**. Plaintiff claims lost profits on sales to certain commercial clients, including Watabe Wedding Corp. Plaintiff submits that estimated gross lost sales from Watabe amount to $264,065. (Ex. 1270.) Defendants do not contest this amount. (Defendants' Proposed Findings of Fact and Conclusions of Law at ¶¶ 143-44.) Defendants argue, however, that because Watabe Wedding Corp. returned as a customer by March 1999, any losses were thereby terminated and losses after the return are pure speculation. (Id. at ¶ 143.) Drace testified, however, that when Watabe returned, it was only with half of their business. (Tr. 3:220.) "[T]hey split their business between two vendors so that they would never be in" the position of being left "high and dry with nobody to do their wedding gowns" again. (Tr. 3:219-220.) Applying the contribution margin to Plaintiff's estimated lost sales from Watabe, Plaintiff is entitled to $158,439.00 in lost profit from commercial sales ($264,065 x 60%). The Court finds such award to fairly and adequately compensate Plaintiff for the lost profit on commercial sales.

203. Although Plaintiff presented some evidence of lost profit on sales involving other companies and groups, Plaintiff did not request these as damages in the Proposed Findings of Fact and Conclusions of Law and no award is made for these items.

204. **DIRECT EXPENSES**. Plaintiff claims various expenses were directly caused by the strike. At trial, Plaintiff submitted as an exhibit a document entitled "Stipulation Re: Amended Damages Claim," listing sixteen items of expenses amounting to $43,837.00, and various legal costs. (Ex.

1270A; Tr. 8:6-10.) The "Stipulation," however, is not a true stipulation in the legal sense, as it is signed only by Plaintiffs' attorney, and was written simply to put Defendants on notice of Plaintiff's amended damages claims. (Id.) The "Stipulation" was accepted by the Court and added to Exhibit 1270 solely for the purpose of amending Plaintiff's damages claims. (Id.)

205. At trial, Drace testified that the list of items directly attributable to the strike was comprised "almost entirely of two major items: the bus and the security guard." (Tr. 3:223.)

206. **Bus**. YLDC hired a bus to transport workers to and from the plant through the picketing strikers, and requests $13,592 in damages for the expense of the bus. (Tr. 3:16-18; Ex. 1270A at 2.) Plaintiff has presented sufficient evidence, in the form of testimony by various witnesses including Drace and Chang, that YLDC replacement and other workers had difficulty entering work through the picket lines. (Tr. 3:17.) Plaintiff is entitled to recover $13,592 in damages for the bus.

207. **Security Guard**. Drace hired a security guard from the Hawaii Protective Association for about $1,000 a week to help him guard against damage to the plant. (Tr. 3:199-200.) From the second day after the strike began, Drace "moved into the plant" because he was worried that there was going to be damage. (Tr. 3:199.) He "lived in the plant for the first week . . . would go home in the daytime and shower and change, and then go back to the plant and try and catch a wink in [his] office." (Id.) Finally after one week, he hired the security guard to give him some relief.

(Id.) Plaintiff YLDC is entitled to recover the claimed $15,958 for the security guard. (Ex. 1270A.)

208. **Additional Vehicles**. Drace testified that YLDC was forced to rent a couple of additional vehicles from Penske during the beginning of the strike because of the time spent trying to get through the picket lines. (Tr. 8:180.) The vehicles transported dry cleaning and occasionally workers who needed to get through the picket line. (Id.) Also based on the testimony regarding the difficulty of passing through the picket lines, the Court finds that Plaintiff YLDC is entitled to $2,107 for the cost of the additional vehicles. (Ex. 1270A at 2.)

209. **Newspaper Advertisement**. Drace testified that YLDC ran a "fairly large banner" advertisement in a Honolulu newspaper on October 11, 1998 to announce openings with YLDC for replacement workers. (Tr. 8:181.) Because the strike caused the need for replacement workers, Plaintiff is entitled to be compensated for this $805 expense.

210. **Stryker Weiner Associates**. The item entitled "Stryker Weiner Associates," with a corresponding expense of $2,317, reflects consultation for a price estimate as to the project cost of repairing YLDC's reputation in the community. (Tr. 3:233.) Testimony at trial established that YLDC's image had been damaged in the community, and that YLDC had lost many customers because of the strike. For example, after the strike, Plaintiff YLDC was "trying to get the fire department to sign an account . . . and [was] told that they couldn't do business with union busters." (Tr. 3:235.) The Court finds that Plaintiff YLDC is entitled to recover the $2,317 paid to Stryker Weiner Associates.

211. **Unrecoverable Items**. The relationships of the other items of expenses claimed by Plaintiff in Exhibit 1270A to the defamatory remarks or the strike (except for interest on the emergency loan which is addressed below) are not sufficiently supported by evidence in the record. For example, Drace testified that, with respect to the claim for "Credit Card - Misc." in Exhibit 1270A, to explain the charge he would have to "guess." (Tr. 8:180.) With respect to the item entitled "Island Pacific Distributors," Drace testified: "That one I really don't recall." (Tr. 8:181.) Plaintiff is not entitled to recover the expenses for the remaining items listed as direct expenses in Exhibit 1270A.

212. **ADDITIONAL UNEMPLOYMENT INSURANCE TAXES**. The striking workers were ruled to be eligible to collect unemployment benefits. (Tr. 3:223.) As strikers began collecting unemployment insurance benefits from the State of Hawaii, YLDC's unemployment reserve account with the State of Hawaii was debited, and the State of

Hawaii has increased YLDC's payroll taxes as a result. (Tr. 3:223.) Plaintiff established at trial that YLDC has paid $17,161 in additional State unemployment taxes as of June 9, 2000 as a result of the rate increase growing out of unemployment benefits paid during the strike caused by the wrongful acts of the Union. (Tr. 3:223-225.) The balance owed was shown to be $344,000. (Id.)

213. Once paid to the State, Plaintiff YLDC loses control and ownership over the money although it is held in an account designated for YLDC as an employer. The award to be paid by YLDC was the subject of an appeal at the time of trial, but the possible success of the appeal was not established. (Tr. 3:225-227.) There also was no showing of state law authority that unemployment caused by a strike under the circumstances here would relieve an employer from the obligation to pay the assessed amount. Defendant has not overcome the presumption that the decision of the state agency would be upheld.

214. The Court awards $17,161 and the present value of the amount which YLDC has paid since June 9, 2000, and is liable to pay in the future, for the rate increase due to the strike.

215. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded twenty days from the date of the filing of this Order. The Defendants shall respond within twenty days of the filing by Plaintiff.

216. **INTEREST ON LOANS**. Plaintiff YLDC requests damages for interest on the emergency loan and

existing debt in the amount of $367,905.67 from 1999 through 2004. (Id.; Pl. Proposed Findings of Fact and Conclusions of Law ¶ 17.13.)

217. **Interest on Emergency Loan**. Plaintiff YLDC claims as damages interest on the emergency loan of $200,000 from the Bank of Hawaii. (Tr. 3:200, 228-229.) The emergency loan was a direct result of the strike.

218. Plaintiff YLDC is entitled to present the interest paid on the emergency loan as of date of the filing of this Order. Plaintiff will be made whole by such an award of damages, after which Plaintiff is entitled to postjudgment interest on any damages not paid to Plaintiff on the date of judgment. The Court finds that such an award adequately compensates Plaintiff for the interest expense on the emergency loan.

219. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded with respect to the emergency loan twenty days from the date of the filing of this Order. Defendants shall respond within twenty days of the filing by Plaintiff.

220. **Additional Interest on Existing Debt**. As a result of the strike, YLDC was unable to meet its principal and interest obligations on outstanding debt to the Bank of Hawaii, Al Phillips and David Applebaum. (Tr. 3:227-29; Ex. 1270, Attachment G.) YLDC was forced to restructure its debt. (Id.)

221. Due to the inability to make payments on existing debt, Plaintiff incurred additional interest expense.

222. YLDC is entitled to recover the present value of additional interest expense paid up until the date of this Order. Plaintiff will be made whole by such an award of damages, as Plaintiff is also entitled to postjudgment interest on any damages not paid to Plaintiff on the date of judgment.

223. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded with respect to the additional interest on existing debt twenty days from the date of the filing of this Order. Defendants shall respond within twenty days of the filing by Plaintiff.

224. **LEGAL EXPENSES**. Plaintiff claims certain legal and related expenses.

225. **Negotiations**. Plaintiff is not entitled to an award for costs under the heading of "Negotiations." (Ex. 1270A at 2.) These costs were incurred prior to the strike and cannot be considered as damages flowing from the strike. Plaintiff admitted at trial that it was not entitled to these costs, as they would have been incurred whether or not a strike had occurred. (Tr. 8:9.)

226. **Challenges to Unemployment Claims**. Costs associated with representation before the State of Hawaii in connection with unemployment claims made by striking employees were not proven to be recoverable. (Id.)

227. **State Court Proceeding**. Plaintiff is not entitled to fees or costs in connection with the proceeding in state court. (Id.) Plaintiff has not presented sufficient evidence about the state court proceeding to demonstrate liability on behalf of the Defendants. (Tr. 8:178-79.)

228. **NLRB Proceeding**. Plaintiff is not entitled to an award for fees and costs associated with the National Labor Relations Board proceeding. (Ex. 1270A at 2.) Plaintiff was forced to defend an unfair labor practice claim filed by the Union during the course of the strike. Although the strike was a but-for cause of the unfair labor practice claim, it was not the proximate cause and, thus, is not recoverable. The Union made an independent determination to file an unfair labor practice charge; this decision broke the causal chain of defamation and resulting strike.

229. **Instant Action**. Plaintiff is not entitled to an award of damages as compensation for legal fees in the instant action. (Id.) Plaintiff recognized it is not entitled to legal expenses for prosecution of the instant case, but only offered the amount "for purposes of allowing [the Court] to consider that as a factor in any punitive damages which [the Court] may be inclined to award." (Tr. 8:8; see also Tr. 7:63.)

230. **Bankruptcy Consultation**. Plaintiff is entitled to an award of $15,854.55 for costs associated with consulting bankruptcy attorney Harrison Chung. (Ex. 1270A at 3.) The consultations were made during the course of and as a result of the strike. (Tr. 8:184.)

231. **Financial Difficulties**. Plaintiff is entitled to $642 paid to Pitluck & Kudo for consulting in connection with YLDC's financial difficulties arising out of the strike. (Ex. 1270A at 3; Tr. 8:184-185.)

232. **Administrative Appeal**. Plaintiff is not entitled to recover $4000 paid to Sensano & Associates there was insufficient proof presented upon which to base an award of damages.

233. **REPUTATIONAL HARM TO YLDC**. As a result of the defamatory statements and the resulting strike of YLDC employees, YLDC suffered substantial harm to its reputation in the community which may hinder YLDC's ability to attract customers and develop business relationships in the future. (Tr. 3:235.) For example, after the strike, Plaintiff YLDC was "trying to get the fire department to sign an account . . . and [was] told that they couldn't do business with union busters." (Tr. 3:235.)

234. The Court finds that Plaintiff can expect to spend $200,000 on advertisements and other efforts to rehabilitate its image, the low estimate apparently given by Plaintiff's advertising consultant. (Ex. 38; Tr. 3:234.) Plaintiff is entitled to recover $200,000 for the reputational harm caused to YLDC as a result of the defamation and resulting strike.

235. **PUNITIVE DAMAGES**. As the Court has already found, Defendants acted with reckless disregard as to the truth or falsity of their defamatory statements. The Court finds, however, that the compensatory damages adequately reflect the unlawful nature of the conduct and that punitive

damages are not necessary to deter Defendants from similar conduct in the future. Lee v. Aiu, 85 Haw. 19, 34 (Haw. 1997). The request for punitive damages is DENIED.

Michael Drace's Damages

236. Drace claims damages in the form of injury to his reputation and emotional distress due to the defamatory statements made by Defendants. The defamatory statements to Union members claiming that Drace had lied about the YLDC's financial condition and that he was hiding profits poisoned the workers against Drace. What was once an amiable work environment became uncomfortable and strained, as Drace was viewed by his employees — some of whom he had worked with for more than twenty years — with distrust and anger as a result of the misinformation provided to YLDC employees by the Union.

237. **Personal Reputation**. Drace was the subject of a loss of esteem in the eyes of his employees and the community. Drace is entitled to an award of $50,000 to compensate him for the injury to his reputation. The Court finds such award to fairly and adequately compensate Drace for the damage to his reputation.

238. **Emotional Distress**. Drace also experienced substantial emotional distress resulting from the Union's statements that he had lied to his employees about the financial condition of the company and was hiding profits, and the stress caused by the strike. This emotional distress was a direct result of the falsehoods told and the strike caused by the Union's defamatory statements. The physical

manifestations of Drace's emotional distress were evident to his employees, including Unice Chang. (Tr. 3:10.) Drace experienced difficulty sleeping and loss of hair as a result of the strike and the damage to his reputation. Drace is entitled to an award of $50,000 for the emotional distress caused by Defendants. The Court finds such award to fairly and adequately compensate Drace for his emotional distress.

Prejudgment and Postjudgment Interest

239. In its discretion, the Court declines to award prejudgment interest. AMFAC, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 136 (Haw. 1992). The Court finds that an award of prejudgment interest is not necessary to correct injustice, as Defendants did not unreasonably delay the litigation or judgment, and the amount awarded to Plaintiffs is sufficient to compensate them for their injuries. Id. at 137; Schmidt v. Board of Directors of Ass'n of Apartment Owners of Marco Polo Apartments, 73 Haw. 526, 534-35 (Haw. 1992); Roxas v. Marcos, 89 Haw. 91, 153 (Haw. 1998) (citing Leibert v. Finance Factors, Ltd., 71 Haw. 285, 293 (Haw.), reconsid. denied, 71 Haw. 664 (1990)).

240. The Court awards postjudgment interest as set out below.

II. CONCLUSIONS OF LAW

1. **Jurisdiction and Venue**. The Defendant Teamsters Union Local 996 is a "labor organization" as that term is defined by Section 2(5) of the Labor Management Relations Act, as

amended ("LMRA"). See 29 U.S.C. § 152(5).

2. The Union was certified as the exclusive bargaining representative of YLDC's dry cleaning employees until May 5, 1999, when it was decertified. (Tr. 8:11-12.)

3. Plaintiff Enivel, Inc. dba Young Laundry and Dry Cleaning (YLDC), is an "employer" in an industry "affecting commerce," as those terms are defined by Sections 2(2) and 2(7) of the LMRA. See 29 U.S.C. §§ 152(2), (7).

4. Jurisdiction over Plaintiffs' claim for violations of Section 303 of the LMRA (Count I) and for violations of Section 301 of the LMRA is present pursuant to 29 U.S.C. §§ 185, 187.

5. Supplemental jurisdiction over Plaintiffs' state law claims of defamation (Count III) and punitive damages (Count VII) is present pursuant to 28 U.S.C. § 1367(a).

6. Venue is appropriate in this Court pursuant to 29 U.S.C. §§ 185(a), 187(b).

7. **Plaintiffs' Claims**. Plaintiffs' Complaint alleged seven causes of action. In particular, Plaintiffs alleged Defendants are liable for: (1) unfair labor practices in violation of Section 303(b) of the Labor Management Relations Act, 29 U.S.C. §§ 187(b), 158(b)(4)(i), (ii)(D), (Count I), (2) tortious interference with prospective contractual relations, (Count II), (3) defamation, (Count III), (4) prima facie tort, (Count IV), (5) violations of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, (Count V), (6) declaratory relief that the

collective bargaining agreement (MLA) was breached, (Count VI), and (7) punitive damages, (Count VII).

8. After this Court ruled on the previously filed dispositive motions, the following claims remained to be tried: Count 1, unfair labor practices in violation of Section 303(b) of the Labor Management Relations Act, 29 U.S.C. §§ 187(b), 158(b)(4)(i), (ii)(D); Count III, defamation with respect to the financial condition of YLDC; Count VI, declaratory relief that the collective bargaining agreement (MLA) was breached; and Count VII, punitive damages, to the extent they are available under state law.

9. Plaintiffs were allowed to amend their Complaint at trial. Plaintiffs amended Count VI of their Complaint to allege that Defendants are liable for breach of the "no-strike" clause of the Master Laundry Agreement in effect at the time of Defendants' strike and that Defendants breached an oral agreement not to strike while progress is being made in negotiations. Plaintiffs allege the breach of the agreement not to strike caused substantial damages.

Unfair Labor Practices (Count I)

10. Plaintiffs have alleged that Defendants committed unfair labor practices in violation of Section 8(b)(4)(ii)(D) of the National Labor Relations Act. See 29 U.S.C. § 158(b)(4)(D) ("NLRA"). Section 8(b)(4)(D) "makes it an unfair labor practice for a labor organization to . . . coerce an employer . . . in order to force or require an employer to assign particular work to one group of employees rather than to another." Nat'l Labor

Relations Bd. v. Plasterers' Local Union No. 79, 404 U.S. 116, 123 (1971).

11. Plaintiffs theorize that Defendants are liable under Section 303 of the Labor Management Relations Act for committing an unfair labor practice. The unfair labor practice alleged is Defendants' efforts to induce or encourage a strike to coerce or force YLDC to assign work to striking YLDC employees to the detriment of replacement workers.

12. To prove an unfair labor practice under Section 8(b)(4)(ii)(D), a plaintiff must prove the existence of a "jurisdictional dispute." A "jurisdictional dispute" is present where two groups of employees present competing claims to the same work. See Foley-Wismer & Becker v. Nat'l Labor Relations Bd., 695 F.2d 424, 427 (9th Cir. 1982).

13. A "jurisdictional dispute" is shown in one of two ways: "(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing particular work." Carey v. Westinghouse, 375 U.S. 261, 263 (1964).

14. A jurisdictional dispute cannot be present if the basis of the alleged unfair labor practice is an attempt by the labor organization to coerce or pressure an employer to assign work within a single bargaining unit. See id. at 263. (See also Order Denying Motion for Reconsideration, filed January 23, 2001, at 7-8).

15. The evidence indicates that the striking YLDC employees and the replacement workers are part of a single bargaining unit. (Exs. 1001, 2003).[11] Accordingly, Defendants' attempts to have striking workers rehired by YLDC does not create a jurisdictional dispute. See Sheet Metal Workers (Albers Milling Co.), 90 NLRB 1015 (1950) (holding that if a union's demands that striking workers be reinstated constitutes a jurisdictional dispute, then "every economic strike would perforce be converted into an unlawful jurisdictional strike after the replacement of strikers, because an object of the continued strike is clearly to secure the reinstatement of strikers to their old jobs. Section 8(b)(4)(D) was not intended so to limit the right to strike for legitimate economic objectives."). Plaintiffs have failed to prove a violation of Section 303 of the Labor Management Relations.

Defamation (Count III)

16. To sustain a claim for defamation under Hawaii law, a plaintiff must establish (1) a false and defamatory statement concerning another, (2) an unprivileged publication

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[11] At the summary judgment stage, Plaintiffs had put forth evidence that the Union had taken the position that many of the replacement workers were not qualified to vote in the decertification election because they were "not in Unit." Plaintiffs' presentation of this evidence was sufficient to survive summary judgment because it demonstrated a genuine dispute as to whether striking workers and replacement workers were both represented by the Union. The evidence at trial demonstrated, however, that striking workers and replacement workers were members of the same bargaining unit and were represented by the Union.

to a third party, (3) fault amounting at least to negligence on the part of the publisher, or actual malice where the plaintiff is a public figure, and (4) either actionability of statement irrespective of special harm, or existence of special harm caused by publication. See Gold v. Harrison, 88 Haw. 94, 100 (1998), cert. denied, 526 U.S. 1018 (1999) (citing Dunlea v. Dappen, 83 Haw. 28, 36 (1996) and Restatement (Second) of Torts § 558 (1977)).

17. A communication is defamatory if it tends to harm the reputation of another or lower him in the estimation of the community. See Restatement (Second) of Torts Section 559 (1976). Defamation per se presumes damages. Statements are defamatory per se when the defamatory nature of the statements are apparent on their face and the injury to the plaintiff's reputation may be presumed. See Hollman v. Brady, 233 F.2d 877, 878 (9th Cir. 1956). Injury is presumed where the statements have a tendency to injure plaintiff in his office, profession, calling, or trade, or hold plaintiff up to scorn and ridicule and to feelings of contempt or execration. See Partington v. Bugliosi, 825 F. Supp. 906, 915 (D. Haw. 1993); Kahanamoku v. Advertiser Pub. Co., 25 Haw. 701 (1920); Ollman v. Evans, 471 U.S. 1127, 1128-29 (1985) ("At the heart of the common law of defamation were a few areas of expression which even when spoken rather than written were regarded as so damaging as to be classified as 'slander per se' and therefore not to require the proof of any special damages in order to allow recovery. One of these categories consists of statements which defame the plaintiff in connection with his business or occupation."). The United States Supreme Court has also held that where

actual malice exists, damages are presumed. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

18. Federal labor law has imposed an additional element for Plaintiffs' defamation claim. The Supreme Court has recognized that labor disputes are "ordinarily heated affairs," see Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966), and that the National Labor Relations Board tolerates "intemperate, abusive and inaccurate statements." See id. at 61; see also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) ("federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.").

19. A state law defamation claim may proceed in federal court to the extent the aggrieved party demonstrates that the defamatory statements were made with actual malice. See Linn, 383 U.S. at 62.

20. Actual malice is shown with knowledge that the statements made are false or made with reckless disregard as to their truth or falsity. See id. at 62-63; see also New York Times v. Sullivan, 376 U.S. 254 (1964). The concept of reckless disregard "cannot be fully encompassed in one infallible definition." St. Amant v. Thompson, 390 U.S. 727, 730 (1968). Reckless disregard must include either a "high degree of awareness of . . . probable falsity" or "serious doubts as to the truth of [the] publication." Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant, 390 U.S. at 731.

21. A plaintiff bears the burden of proving actual malice through clear and convincing evidence. See Newton v. Nat'l Broad. Co., Inc., 930 F.2d 662, 669-70 (9th Cir. 1990), Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 659 (1989).

22. Statements of opinion are not actionable under defamation law because there is no such thing as a false idea. See Austin, 418 U.S. at 284 (citing Gertz, 418 U.S. at 339-40); see also Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1438 (9th Cir. 1995).

23. This Court has granted summary judgment in favor of Defendants to the extent Plaintiffs' defamation claims rely on allegedly defamatory statements which were not related to the financial health of YLDC. Plaintiffs failed to provide evidence of actual malice, except in connection with allegedly defamatory statements regarding the financial health of YLDC. (October 5, 2000 Order at 14-19).

24. **Privilege**. Defendants argue that the statements made by Defendant Kahele to the Union members are privileged. Defendants cite Vlasaty v. Pac. Club, 4 Haw. App. 556, 562 (1983), for the proposition that statements reasonably made pursuant to the discharge of a private duty are privileged.

25. In Vlasaty, the State of Hawaii Supreme Court addressed the question of whether statements made by the President of a private club to club members was entitled to a privilege from liability from defamation. Vlasaty involved certain statements made by the President that an employee

committed theft. The Court explained that the management had a private duty to protect the interests of the club and its members and that the recipients of the allegedly defamatory statements had an interest in such information. Relying on Aku v. Lewis, 52 Haw. 366, 371 (1970), the court explained that the qualified privilege exists where (1) the author reasonably acts in discharge of some public or private duty, and (2) the author and the recipients of such publication have a corresponding interest in the information. See Vlasaty, 4 Haw. App. at 562.

26. The privilege announced in Vlasaty does not extend to statements made with malice. Id. at 564; see also Russell v. Am. Guild of Variety Artists, 53 Haw. 456, 463, n.4 (Haw. 1972) ("the qualified privilege must be exercised in a reasonable manner and for a proper purpose"). The Court has found the Union's statements of September 11 and September 29 to have been made with reckless disregard for their truth. A finding of malice negates the privilege that may otherwise apply to Defendants' statements.

Breach of the Collective Bargaining Agreement (Count VI)

27. Section 301 of the Labor Management Relations Act states in relevant part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any

> district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). Accordingly, a plaintiff may bring an action in United States district court for damages for the breach of a collective bargaining agreement.

28. Plaintiffs claim that Defendants breached Section 29 of the Master Laundry Agreement when the Union struck against YLDC. Section 29 prohibits striking while the MLA is in force.

29. **Estoppel**. Defendants argue that Plaintiffs are estopped from arguing that the MLA was in force as of the time of the strike. Repudiation of a contract estops the repudiating party from relying on the repudiated contract to hold another party in violation of the contract. See Cal. Trucking Assn. v. Brotherhood of Teamsters & Auto Truck Drivers, Local 70, 679 F.2d 1275, 1283-84 (9th Cir. 1982).

Damages

30. It is well-settled that a trial court's computation of damages is a determination of fact and should be upheld on appeal unless clearly erroneous. Maxey v. Butchers' Union Local No.126, Amalgamated Meat Cutters and Butchers Workmen of N. Am., AFL-CIO, 627 F.2d 912, 915 (9th Cir. 1980) (citing Felder v. United States, 543 F.2d 657, 663 (9th Cir. 1976)). A computation that is a just and reasonable

inference and is supported by substantial evidence in the record shall be upheld. Id. at 916.

31. **Individual liability**. Plaintiffs are not entitled to recovery from Kahele in his individual capacity. In Complete Auto Transit, Inc. v. Reis, the Supreme Court held that damage claims under the Labor Management Relations Act may not be brought against individual union officers in their individual capacities. 451 U.S. 401, 402 (1981). The Supreme Court explained "the legislative history of Section 301 clearly reveals Congress' intent to shield individual employees from liability for damages arising from their breach of . . . a collective bargaining agreement . . ." Id. At 407.

32. The rule of Complete Auto Transit also bars any recovery from Kahele in his individual capacity under the state law of defamation. See Williams v. Pac. Maritime Assoc., 421 F.2d 1287, 1289 (9th Cir. 1970); Universal Communications Corp. v. Burns, 449 F.2d 691, 693-94 (5th Cir. 1971) (per curiam).

33. **Loss of Productivity**. The parties agree that loss of productivity is equal to the net increase in the cost of labor as a percentage of total sales. (Tr. 8:58-59.) Specifically, the post-strike cost of labor as a percentage of sales, less the pre-strike cost of labor as a percentage of sales, multiplied by gross post-strike sales yields the loss in productivity. (Id.)

34. **Lost Profits**. A determination of lost profits requires a comparison of net profits, rather than gross profits

or gross sales revenue. Omura v. Am. River Investors, 78 Haw. 416, 418-19 (Haw. App. 1995) (vacating a judgment as to the award of damages and attorneys' fees because the plaintiff failed to provide the court with evidence of relevant costs).

35. **Punitive damages**. A claim of punitive damages is not an independent tort but is incidental to the cause of action. See Kang v. Harrington, 59 Haw. 652, 660 (1978).

36. Plaintiffs are not entitled to punitive damages in connection with their claims under Counts I and VI. These claims are based on Sections 301 and 303 of the Labor Management Relations Act. Punitive damages are not available in connection with claims brought under Sections 301 and 303. See Williams, 421 F.2d at 1289; Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U.S. 252, 260-61 (1964).

37. Punitive damages are only available in connection with Plaintiffs' claims under Count III for defamation. Under Hawaii law, punitive damages are only justified where the plaintiff proves by clear and convincing evidence that the wrongdoer acted "wantonly, oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." Quedding v. Arisumi Bros., Inc., 66 Haw. 335, 340 (1983); Maheu v. Hughes Tool Co., 569 F.2d 459, 479 (9th Cir. 1978) ("knowledge of falsity or reckless disregard for the truth" is required); Kang, 59 Haw. at 660-61.

38. The appropriate measurement of punitive damages is "the degree of malice, oppression, or gross negligence

[that] forms the basis for the award and the amount of money required to punish the defendant." Kang, 59 Haw. at 663.

39. **Attorneys' Fees**. Under Hawaii law, attorneys' fees are not recoverable "unless so provided by statute, stipulation, or agreement." Rosa v. Johnston, 3 Haw. App. 420, 430 (Haw. App. 1982) (cited in Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1360 (9th Cir. 1987)). Attorneys' fees may also be recovered upon a showing of bad faith. Hall v. Cole, 412 U.S. 1, 5 (1973).

40. **Prejudgment Interest**. Prejudgment interest, where appropriate, is awardable in the discretion of the court. Sentinel Ins. Co. v. First Ins. Co., 76 Haw. 277, amended on other grounds, 76 Haw. 453 (1994); see also Sussel v. Civil Serv. Comm'n of City & County of Honolulu, 74 Haw. 599, 618 (Haw. 1993). A court may deny prejudgment interest where it is not necessary to correct injustice, where Defendants did not unreasonably delay the litigation or judgment, and where the amount awarded to Plaintiffs is sufficient to compensate them for their injuries. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 136-37 (Haw. 1992); Schmidt v. Bd. of Dirs. of Ass'n of Apartment Owners of Marco Polo Apartments, 73 Haw. 526, 534-35 (Haw. 1992). The denial of prejudgment interest is reviewed for an abuse of discretion. Eastman v. McGowan, 86 Haw. 21, 26-27 (Haw. 1997).

41. **Postjudgment interest**. Postjudgment interest is awarded "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the

defendant." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 835-36 (1990) (citation omitted). Postjudgment interest is calculated based on the total judgment at the rate applicable under 28 U.S.C. § 1961(a).

III. ORDER

Based on the evidence adduced at trial, and the Findings of Fact and the Conclusions of Law stated herein, it is hereby ORDERED, ADJUDGED AND DECREED:

1. **Judgment be entered on behalf of PLAINTIFF YOUNG LAUNDRY & DRY CLEANING against Defendant Local 996 in the sum of $885,323.55, as follows:**

Loss of Productivity	121,332.00
Loss of Profit on Retail Sales	337,116.00
Loss of Profit on Comm. Sales	158,439.00
Direct Expenses	
Bus	13,592.00
Security Guard	15,958.00
Additional Vehicles	2,107.00
Newspaper Advertisement	805.00
Stryker Weiner Associates	2,317.00
	34,779.00
Additional Unemployment Insurance Taxes	17,161.00
Other Legal and Related Expenses	
Bankruptcy Consult.	15,854.55
Pitluck & Kudo	642.00

	16,496.55
Damage to Reputation	200,000.00
Total Damages to YLDC:	**$885,323.55**

2. **Judgment be entered on behalf of PLAINTIFF MICHAEL DRACE against Defendant Local 996 in the sum of one hundred thousand dollars ($100,000.00), as follows:**

Plaintiff Michael Drace as follows:

Damage to Reputation	$50,000.00
Emotional Distress	50,000.00
Total Damages to Drace:	**$100,000.00**

3. **Defendant Local 996 is also liable to PLAINTIFF YOUNG LAUNDRY & DRY CLEANING in accordance with the following:**

Future Additional Unemployment Insurance Taxes

The Court awards the present value of the amount which YLDC has paid since June 9, 2000, and is liable to pay in the future, for the unemployment insurance rate increase due to the strike. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded twenty days from the date of the filing of the original Order on September 28, 2001. Defendant shall respond within twenty days of the filing by Plaintiff.

Emergency Loan Interest and Additional Interest on Existing Debt

The Court awards the present value of all interest expense with respect to the $200,000 emergency loan from the Bank of Hawaii, and the additional interest expense on YLDC's existing debt to Applebaum, Al Phillips, and Bank of Hawaii, up until the date of the original Order on September 28, 2001. Plaintiff shall submit a memorandum and appropriate proof of the amount awarded twenty days from the date of the filing of the original Order on September 28, 2001. Defendant shall respond within twenty days of the filing by Plaintiff.

4. **POSTJUDGMENT INTEREST at the applicable rate specified at 28 U.S.C. § 1961(a) is awarded from the date judgment is entered until satisfied.**

5. **The Court declines to order PREJUDGMENT INTEREST or PUNITIVE DAMAGES.**

IT IS SO ORDERED.

Dated: Honolulu, Hawaii October 28, 2001.

/s/_____
Helen Gillmor
United States District Judge

Supreme Court, U.S.
FILED
JAN 29 2003
OFFICE OF THE CLERK

No. 02-817

IN THE

Supreme Court of the United States

STEAM PRESS HOLDINGS, INC., DBA YOUNG LAUNDRY AND DRY CLEANING, AND MICHAEL DRACE,
Petitioners,

v.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, AS AN INDIVIDUAL, DOE DEFENDANTS 1-150,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent, Hawaii Teamsters and Allied Workers, Local 996, hereby discloses that it is not a corporation. As such, the Union has no affiliates, parents or subsidiaries that have publicly issued shares.

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IN THE

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Hawaii Teamsters and Allied Workers, Local 996 and Mel Kahele respectfully request the petition for writ of certiorari sought in this matter be denied.

INTRODUCTION

Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union Local 996, 302 F.3d 998 (9th Cir. 2002), is not a controversial opinion. Its central holding echoes a well established rule of defamation law that this Court and the courts of the Ninth Circuit have followed for years: In order for challenged speech to be actionable, it must be reasonably susceptible to a defamatory interpretation. This maxim

applies with particular force when the speech in question occurs in the course of a labor dispute: As this Court stated in *Letter Carriers v. Austin*, 418 U.S. 264, 283-4, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974), "The sine qua non of recovery for defamation in a labor dispute . . . is the existence of falsehood." And as this Court observed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), before a court can reach the test for knowing or reckless falsehood, it must have determined that the statement in question is false and defamatory. Even *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966)—the precedent on which petitioners purport to pin their hopes—is in complete accord on this point: "[Plaintiff] must show that he was injured by the circulation of the statements; *this necessarily includes proof that the words had a defamatory meaning*." *Id.* at 58, fn. 2 (emphasis added).

The Ninth Circuit resolved this cases on the basis of its determination that the statements "Mike is making money," "Mike Drace is making money from the Steam Press," and "Mike is hiding money in the Steam Press" are not defamatory.

The court reached this determination after carefully applying the test that has been employed in the Ninth Circuit and in most other jurisdictions for decades to resolve the question of defamatory meaning, to wit: the "totality of the circumstances test." This test was presaged by this Court's decision in *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 9, 110 S.Ct. 2695, 111 L.Ed.2d (1990), and subsequently refined in a long line of cases including *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (cert. denied 499 U.S. 961, 111 S.Ct. 1586, 113 L.Ed.2d 650 (1991)), *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995), and *Dodds v. Am. Broad. Co.*, 145 F.3d 1053 (9th Cir. 1998).

The Ninth Circuit Court began its application of the "totality of the circumstances" test in this case by examining the challenged statements in their broad context, considering, *inter alia*, their general tenor, subject matter, setting and format. The court's analysis did not stop there. It then proceeded to evaluate the specific words in question with an eye for any figurative or hyperbolic language that might affect a listener's understanding. Finally, it applied the prong of the test which this Court emphasized in *Milkovich*: the evaluation of the statements' verifiability, *i.e.*, their susceptibility to being proven true or false. *See Hawaii Teamsters*, 302 F.3d at 1006; *Milkovich*, 497 U.S. at 19.

Each prong of the court's analysis was well reasoned, thoughtfully circumscribed, and informed by long-standing precedent. The court broke no new ground when it penned this opinion. But this would come as a surprise to any stranger to the case who reads Steam Press's petition for certiorari for the first time. There, Steam Press characterizes the Ninth Circuit's holding as an "arbitrary," "speculative" decision that eviscerates this Court's decision in *Linn*, contravenes *Milkovich* and "creates" an "absolute privilege" for defamatory statements made in the labor context. None of these charges are remotely born out by the language of the Ninth Circuit's opinion and all depend on unduly selective—indeed tortured—readings of the controlling authorities.

In this brief, respondent Hawaii Teamsters will demonstrate that each of the four grounds on which Steam Press seeks certiorari lacks merit. Specifically, the Union will show that:

1. The Ninth Circuit's opinion neither "conflicts with" nor "seeks to nullify" *Linn*. To the contrary: On the very limited legal point that the two cases have in common (*i.e.*, the requirement that the challenged statements in a state defamation action brought in the context of a labor dispute must be defamatory to give rise to liability), they are entirely

in accord. Further, Steam Press's insinuation that this case somehow signals the death knell of state defamation liability in the labor sphere is pure histrionics. The Ninth Circuit did no more than find several innocuous statements to be non-defamatory under a particular set of facts. It made no sweeping pronouncements on the general viability of defamation actions that are spawned by labor disputes and did not foreclose state defamation remedies when challenged speech meets the threshold requirement of being defamatory.

2. The Ninth Circuit's opinion is not inconsistent with *Milkovich*. In this regard, Steam Press's contention that *Milkovich* "set a non-contextual standard" for determining the defamatory meaning issue is belied by the reasoning of the *Milkovich* court. In explaining the constitutional underpinnings of the fact/non-fact dichotomy, the *Milkovich* Court embraced decisions such as *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970), *Letter Carriers*, 418 U.S. 264, and *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), all of which relied heavily upon the context of the challenged speech in resolving the defamatory meaning question. Moreover, in this case, the Ninth Circuit placed great weight on the verifiability component of the defamatory meaning analysis and thereby focused on precisely the factor emphasized in *Milkovich*.

3. The Ninth Circuit's opinion does not conflict with any extant decision on federal labor policy for the simple reason that it is not based—and does not purport to be based—on such policy. It is a decision based solely on defamation law.

4. The Ninth Circuit's opinion does not "create an absolute privilege" for defamatory speech in the context of a labor dispute. It merely states that challenged statements uttered in the course of a labor dispute—like challenged statements in any other context—must be defamatory to be actionable. The opinion does not suggest that statements

made in a collective bargaining or strike setting can never be defamatory. It does not even hint that, henceforth, the judicial parsing of statements made in such settings will be more rigorous than or otherwise different from that employed heretofore in cases like *Letter Carriers*. No new privilege is spoken of—much less created.

In sum, the instant opinion does not conflict with the opinion of any court cited by petitioners. The opinion has no implications for (and does not involve the interpretation of) federal labor statutes because it is based solely on defamation law. There is no intimation that the court departed in any way from accepted judicial procedures. There is no basis for the grant of certiorari in this case.

FACTS OF THE UNDERLYING CASE

In September of 1998, and for many years before, Young Laundry and Dry Cleaning, Inc. ("YLDC") was a retail dry cleaning business that employed approximately 70-80 workers. [ER 107, ¶ 1.] YLDC was a unionized establishment. Its employees were represented by the Hawaii Teamsters and Allied Workers, Local 996 (the "Union"). In 1998, the Union's president was Kahele. Kahele had held this position for only two short years. [ER 108, ¶¶ 6,7.]

YLDC's employees were, by and large, middle aged to elderly, female and relatively unskilled. [ER 17:11-16.] Many of them were not proficient in English. In fact, the Union could only communicate with its members by using a translator who spoke Ilocano and Tagalog, as well as English. [ER 18:2-5; ER 19:4-8.] A significant number of these women had worked for YLDC for decades.

In September, 1994, YLDC's former manager, Michael Drace ("Drace"), offered to purchase YLDC from its owners on condition that the Union agree to numerous concessions on employee wages and benefits. [ER 108, ¶ 4; ER 110, ¶ 15; *Hawaii Teamsters*, 302 F.3d at 1001.] Drace had known

many of the employees for years. He approached them personally and persuaded them that concessions were necessary if the business was to survive. He promised that the healthcare, sick leave, paid vacation time and other benefits that he was asking them to give up would be restored after four years. Although the precise words of Drace's promise are not in evidence, it is clear that the employees understood the concessions as a "*loan*" that would be repaid. [ER 20:1-6; ER 21:4-6; ER 20-25; ER 22:11-22.] Ultimately, the Union agreed to the concessions YLDC was sold to Drace on September 30, 1994.

From September of 1994 until the summer of 1998, YLDC's employees served their employer loyally and without complaint—notwithstanding the sacrifice of benefits and wage increases that Drace had insisted upon. Drace maintained a cheerful and upbeat demeanor, and the employees had no reason to believe that the business was not doing well. [ER 23:20-24:8.] From the employees' perspective, YLDC showed signs of prospering. It expanded its operations by purchasing seven dry cleaning stores from the Al Phillips chain. [ER 25:6-9; ER 26:3-4; ER 27:10-25.] It acquired a number of new delivery trucks and spent a significant sum to refurbish existing stores and vehicles. [ER 28:3-4; ER 24-25; ER 29:1-15.]

On July 13, 1998, shortly before the expiration of the four-year period during which the concessions were to be in effect, the Union notified YLDC that it wished to reopen negotiations of its agreement with the company. [ER 113, ¶ 23; *Hawaii Teamsters*, 302 F.3d at 1002.] The Union had been in close contact with the employees [ER 30:18-25] and understood that their goal was "to get back what they had lent the company about four years ago, the holiday that was lent, the sick leave, and the other thing[] that they lent to the company to help." [ER 20:1-6.]

One week later, Drace responded with a letter written on behalf of YLDC. Drace's letter stated that YLDC was in financial trouble. He maintained that YLDC could not compete with non-unionized dry cleaners and proposed that the employees' benefits be cut further. [ER 114, ¶¶ 27-28; *Hawaii Teamsters*, 302 F.3d at 1002.] Drace offered to make YLDC's books and records available for the Union's inspection. *Hawaii Teamsters*, 302 F.3d at 1002.

From this letter and YLDC's further communications with the Union, the employees knew that Drace was not only breaking his promise to restore their benefits but was proposing to make further reductions. From their perspective, their four years of sacrifice had been met with betrayal; they had been duped.

The Union was aware that, in past labor negotiations, Drace's predecessor had pled poverty and then had ultimately made concessions. It therefore understood Drace's response as a bargaining strategy. [ER 31:13-25; ER 32:3-10; ER 33:1-15.] Instead of responding directly to Drace's proposal, the Union decided to conduct its own investigation into YLDC's finances and, to this end, asked the International Brotherhood of Teamsters to provide it with information. *Hawaii Teamsters*, 302 F.3d at 1002. At the same time, it organized a negotiating committee from the ranks of YLDC's employees. [ER 115, ¶¶ 30-31.]

On August 24, 1998, before the parties' first bargaining session, YLDC sent its second proposal to the Union. This proposal was even worse than the first one from the Union's perspective: in addition to benefit concessions, it sought a 5% wage concession. Again, the asserted justification for the proposed terms was YLDC's poor financial health. [ER 115, ¶¶ 32-33.]

On September 2, 1998, Union representatives met with Drace and others to discuss YLDC's proposals. In the course

of this meeting, Drace presented numerous charts and graphs that purported to portray YLDC's financial condition. [ER 117, ¶¶ 37-39; *Hawaii Teamsters*, 302 F.3d at 1002.] He advised the Union that the substantial concessions he proposed were required if YLDC was to survive. The Union representatives remained skeptical and told Drace that charts can be "made to show anything that [one] wants them to show." [ER 34:1; *Hawaii Teamsters*, 302 F.3d at 1002.] In response to Drace's demands, the Union proposed the restoration of the benefits that had been conceded in 1994 together with wage increases for each of the following three years. *Hawaii Teamsters*, 302 F.3d at 1002. Kahele advised Drace that the employees would not accept YLDC's earlier proposal. Drace rejected the Union's proposal out of hand. [ER 118, ¶¶ 41-42.]

On September 10, 1998, another negotiating session was convened. At that session, YLDC presented its third proposal which was similar, in all material respects, to the second proposal. *Hawaii Teamsters*, 302 F.3d at 1002. The Union rejected it. During this meeting, the Union representatives inquired about a company whose existence they had discovered just one day earlier and whose name was unfamiliar to them. The company was Steam Press Holdings, Inc. ("Steam Press"). When the Union representatives asked about the relationship between Steam Press and YLDC, Drace told them that Steam Press was a holding company "**set up to invest the *profits* of YLDC.**" [ER 123, ¶ 61; ER 35:3-16; *Hawaii Teamsters*, 302 F.3d at 1002.] When this statement provoked further questions, Drace fell silent and his counsel, Jared Jossem, insisted that all further questions about Steam Press be submitted to the company in writing. [ER 36:11-14.] Jossem then escalated the tension in the room by demanding to know whether the Union representatives were calling Drace "a liar." [*Hawaii Teamsters*, 302 F.3d at 1002.] Union representative Torres responded "we can," and representative Kahele added "We will," thereby manifesting

his deep mistrust of Drace and YLDC. [ER 37:17-38:17; ER 60:1-6; ER 39:3-5; *Hawaii Teamsters*, 302 F.3d at 1002.]

On September 8, 1998, the Union received a Dun & Bradstreet Report (hereinafter the "D&B Report") and supporting documents that contained information about Enevil, Inc., d/b/a Young Laundry and Dry Cleaning. Kahele examined the Report and noticed that YLDC's sales were $7,000,000 per year. [ER 40:1-4.] The D&B Report's supporting documents showed that YLDC had recently agreed to acquire seven laundry drop-off locations from the Al Philips chain. From these indicators, Kahele inferred that YLDC was profitable. That Kahele misinterpreted the D&B Report is not disputed. However, the record is devoid of evidence that his belief in YLDC's financial stability was anything but genuine.

On September 11, 1998, Kahele addressed a meeting of Union members who had gathered to discuss the Union's negotiations. According to the testimony of one member who attended the meeting, Kahele stated that "Mike is making money" and "Mike Drace is making money from the Steam Press." [ER 135, ¶ 120; *Hawaii Teamsters*, 302 F.3d at 1002.][1]

Throughout the course of the parties' negotiations, Drace had made certain that YLDC's employees were familiar with the company's side of the story. He posted YLDC's proposals on the company bulletin board and notified them of the parties' bargaining sessions. [ER 41:11-22.] Drace explained YLDC's precarious financial condition to the employees and even offered to split with them any "profits" that they could

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[1] The District Court found that Kahele also said that Drace "is hiding money in Steam Press." It based this finding on the testimony of Hannah Kilakalua. However, the witness did not testify that Kahele spoke the words "Mike is hiding money" or any similar words. [ER 46:24-25; ER 47:9-16.]

locate. [ER 42:18-25.] At all times, the employees were fully informed as to the parties' respective positions.

On September 17, 1998, a third negotiating session took place. Again Drace offered YLDC's books and tax returns to the Union for inspection. The Union declined the invitation. [ER 126, ¶ 72.]

As the negotiations proceeded, the Union representatives heard the same refrain from the employees again and again: "What is so unreasonable about what we're asking? All we asking is what we lend the company." [ER 43:1-15.] The employees clearly expressed their lack of sympathy for YLDC's financial plight, saying: ". . . *How could the [company] have a hard time when they could buy seven Al Phillips stores, they buy new trucks, they buy new equipment?*" [ER 43:24-44:4.] They were determined that their benefits be restored—regardless of YLDC's condition. They repeatedly warned the Union representatives that, if their demands were not met they would strike, and if the representatives refused to advance this agenda, they would oust them. [ER 43:3-15; ER 44:13-25; ER 45:8-20.] In response to the mood of its members, the Union sought approval of strike benefits from the Teamsters Joint Council 42. [AF, ¶ 74.]

On September 25, 1998, the Union agreed to have its accountant examine YLDC's books. Kahele accompanied Union accountant Terry Takaki to YLDC's offices where they were presented with the consolidated books and records of YLDC and Steam Press. [ER 48:14-49:20; *Hawaii Teamsters*, 302 F.3d at 1002-3.] After reviewing these materials, Takaki informed Kahele that YLDC had no money. [*Hawaii Teamsters*, 302 F.3d at 1003.] Kahele knew that the members would not be responsive to the Union's explanations of YLDC's financial problems. [ER 50:17-19.]

The employees' strike authorization vote took place on September 29, 1998. By this time, the employees had determined that they would strike. [*Hawaii Teamsters*, 302 F.3d at 1003.] Union representative Jose Bob Bruno tried to explain the possible adverse consequences of a strike. He also advanced YLDC's argument that it could not afford to meet the Union's demands. [ER 51:10 to ER 43:1-25 to ER 44:1-25 to ER 52:1-9.] The members responded that they were striking of their "own free will" and would "replace" the Union representatives if they failed to support this decision. These vehement attitudes were expressed *before* Kahele arrived at the strike authorization meeting. [ER 52:1-11.] At some point before the vote took place, the name Steam Press was mentioned. The District Court found that, among other things, "Kahele and others" mentioned that "Drace is making money from Steam Press." [ER 125, ¶ 69; *Hawaii Teamsters*, 302 F.3d at 1003.] At this meeting, the employees voted 80-8 in favor of a strike.

Despite this overwhelming majority vote, the Union deferred economic action and returned to the bargaining table hoping to use the strike authorization as leverage. On October 2, 1998, the parties met again with the federal mediator, but no significant progress was made. [ER 129, ¶ 91.]

On October 5, 1998, Drace unilaterally implemented his "last, best and final offer." The concessions he proposed at the outset of negotiations were forced upon the bargaining unit. [ER 129, ¶ 91.] Even then, no strike was called. Instead, the Union agreed to attend another meeting with Drace on October 6, 1998, during which Drace quipped that the employees could be placated if Kahele would tell them that *"ninety-five percent of their pay is better than zero percent."* [ER 130, ¶ 92.] Not surprisingly, the parties declared an impasse. [ER 131, ¶ 95.]

The next day, Kahele returned to the bargaining unit and informed the members of what had transpired since the first strike authorization vote. He wanted to be certain that their collective will was to strike. Kahele then called for a final vote. The members voted with their feet. All who wanted to strike were directed to move to one side of the room, while those opposed were instructed to remain where they were. Everyone present moved to the "strike side" of the room. [ER 52:10-53:13.] The following day, the YLDC employees struck. [ER 131, ¶ 97.]

I. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN LINN

The issue upon which the instant case turned was that of defamatory meaning. The specific question addressed by the Ninth Circuit was whether, under the established legal criteria, the challenged statements could reasonably be interpreted as defamatory statements of fact. By ruling that the statements in question were not defamatory, the court effectively precluded defamation liability. Because its ruling on the defamatory meaning issue was case-determinative, the court deemed it unnecessary to adjudicate the remaining issues raised in the Union's appeal, to wit: the "of and concerning" doctrine and the constitutional malice question. *Hawaii Teamsters*, 302 F.2d at 1009, fn. 6. Since the court's opinion did not discuss—much less adjudicate—either of those issues, it cannot be deemed to diverge from established precedent on either issue.

By contrast, the central issue in *Linn v. United Plant Guards Workers*, was that of federal preemption. The *Linn* court framed the issue as follows: "The case before us presents the question whether, and to what extent, the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §141 *et seq.* (1964 ed.), bars the maintenance of a civil action for libel instituted under state law by an official of an

employer subject to the Act, seeking damages for defamatory statements published during a union organizing campaign by the union and its officers." *Linn*, 383 U.S. at 55. In that case, the Court concluded that state defamation remedies are available to a plaintiff involved in labor disputes *if* s/he pleads and proves that the defamatory statements were published with constitutional malice as defined in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Linn*, 383 U.S. at 55.

At no point in the opinion does the *Linn* court undertake a defamatory meaning evaluation of the challenged statements before it. Nor does it appear from the text of the opinion that any defendant raised a defamatory meaning challenge at any point in the proceedings. However, the *Linn* court does acknowledge that, even in the context of a labor dispute, the plaintiff "must show" that the challenged "words had a defamatory meaning." *Linn*, 383 U.S. at 58, fn.2.

Because the *Linn* court never discussed—much less ruled on—the defamatory meaning issue, it is simply ludicrous to suggest that *Hawaii Teamsters*—which arises *solely* from the court's resolution of the defamatory meaning issue and does not touch upon labor policy, federal preemption or even constitutional malice—is in conflict with *Linn*. Yes, both cases involve defamation actions brought by management as a result of words published during a labor dispute, but each deals with distinct, non-overlapping legal issues. And, notwithstanding Steam Press's protests to the contrary, *Hawaii Teamsters* does *not* hold that defamation plaintiffs who were participants in a labor dispute can never avail themselves of their state remedies. Nor does it hold that the fact that the challenged speech arises in a labor setting automatically renders it non-defamatory. It simply states—and rightly so—that the labor dispute context is a factor in the defamatory meaning analysis.

Not only does *Hawaii Teamsters* not conflict with *Linn*, but it harmonizes with that decision in an important respect. The *Linn* court recognized that the labor relations context must be taken into account in evaluating all aspects of a defamation case that arises in the course of a dispute between labor and management. Indeed, although it did not attempt to resolve any specific defamatory meaning issue, the *Linn* court went out of its way to note that "Labor disputes are ordinarily heated affairs; *the language that is commonplace there might well be deemed actionable per se in some state jurisdictions*. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions." *Linn*, 383 U.S. at 58, quoting *Cafeteria Employees Union, etc. v. Angelos*, 320 U.S. 293, 295, 64 S.Ct. 126, 88 L.Ed. 58 (1943) (emphasis added).

As this Court observed in *Letter Carriers*, *Linn* recognized that federal law gives a union license to use intemperate, abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point. *Letter Carriers v. Austin*, 418 U.S. at 283. The point is that if the *Linn* court *had* undertaken a defamatory meaning analysis, it undoubtedly would have proceeded along a course similar to that followed by the Ninth Circuit here.

One final point must be made. In its petition, Steam Press correctly cites *Linn* for the proposition that, when "constitutional malice" is pled and proved, plaintiffs who might otherwise be limited to the non-remunerative remedies of the NLRA may seek redress under state defamation law. Steam Press then commits a logical fallacy. It loudly insists that, because the statements at issue in this case were made with constitutional malice, Steam Press must be entitled to its state defamation remedies. The flaws in this reasoning are obvious: First of all, the *Linn* court never held that

defamation liability is automatic wherever reckless disregard for truth is pled and proved. Rather, it expressly held that plaintiff must first, as a prerequisite to liability, prove defamatory meaning. That is, *Linn* agrees that the existence of constitutional malice only gives rise to defamation remedies if the challenged statement is first found to be defamatory. Malice in the absence of a defamatory statement is not enough. Conversely, the Ninth Circuit's ruling in this case was not based on the absence of constitutional malice but on the lack of defamatory meaning. It certainly did not rule that defamatory statements uttered with constitutional malice never give rise to liability in a labor context. On the contrary: it cited *Linn* for its holding that defamatory statements made with constitutional malice are actionable in state court even when made in the context of a labor dispute.

It is important to recognize that the resolution of the defamatory meaning question necessarily precedes the resolution of the constitutional malice question. This is because no statement—not even one spoken with reckless disregard for truth—can give rise to defamation liability unless it is defamatory. As the court stated in *Masson v. New Yorker Magazine, Inc.*, 832 F. Supp. 1350, 1367 (1993), "[f]alsity and defamatory meaning are analytically separate. A statement may be false, and a publisher may act with reckless disregard as to truth or falsity. However, if the statement is not defamatory, no liability may attach." This Court took effectively the same position in *Gertz v. Welch* when it held that the test for constitutional malice cannot be reached unless the statement at issue is defamatory. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 339-340.

In essence, Steam Press proposes that this Court somehow conflate the logically distinct analyses of defamatory meaning and constitutional malice and hold, contrary to all precedent, that the defamatory meaning analysis should hinge—not on a reasonable listener's interpretation of the challenged

speech—but on the speaker's subjective state of mind as to its truth. This reasoning is spurious and utterly lacking in support. It must be rejected.

In sum, the *Linn* and *Hawaii Teamsters* decisions deal with distinct and non-overlapping legal issues. They do not conflict in any way.

II. THE NINTH CIRCUIT'S OPINION IS NOT INCONSISTENT WITH MILKOVICH

As Steam Press would have it, the Supreme Court in *Milkovich* prescribed a mechanistic one-factor test that must be applied without deviation each time the defamatory meaning issue arises. The test, according to Steam Press, is whether the statement is "sufficiently capable of being proven true or false." Petition, p.17. The *Hawaii Teamsters* decision runs afoul of *Milkovich*, Steam Press argues, by employing a "totality of the circumstances test" that involves careful consideration of the context in which the challenged speech occurs. Steam Press take the position that, under *Milkovich*, the "context" of the challenged speech may not be considered as part of the defamatory meaning analysis.

The first point that must be made in response to this argument is that its premise is demonstrably incorrect. At no time in its history has the Supreme Court advocated a simplistic "one-step" formula for determining whether challenged speech is deserving of Constitutional protection. Indeed, this Court has traditionally shown great sensitivity to the context in which a statement is made and has routinely examined the surrounding circumstances to determine whether they affect the manner in which the language might reasonably be construed.

Cases in point include *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 at 13-14 (in which the Court placed great weight upon the fact that the allegedly defamatory statements were made in the context of a heated public controversy and

thus could be viewed as no more than "vigorous epithet"), *Letter Carriers*, 418 U.S. at 283-85 (in which the Court deemed the challenged speech non-actionable in large part because it was published in the context of a bitter labor dispute),[2] and *Hustler Magazine v. Falwell*, 485 U.S. 46 (in which the High Court considered the fact that the challenged speech appeared in cartoon format in the pages of a notoriously irreverent, not to say risqué, men's magazine, and determined that, when viewed in context, the speech could not reasonably be interpreted as defamatory of plaintiff). It cannot be overemphasized that *Milkovich* does not represent a break with this tradition. Rather, *Milkovich* embraces this approach by citing these cases at length and with approval: "Next, the *Bressler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20.

Steam Press's premise is in error for a more specific reason: The defamatory meaning analysis employed by the *Milkovich* court was hardly mono-dimensional. Instead of simply determining whether the words "Milkovich . . . lied" were capable of being proved false, the High Court evaluated

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[2] It is noteworthy that the *Letter Carriers* court anticipated exactly the argument that defendants make here, *i.e.*, that if the judiciary routinely considers the context of speech that occurs during a labor dispute, it will always deem the speech non-actionable. In response, the High Court stated: "This is not to say that there might not be situations where the use of this writing or other similar rhetoric in a labor dispute could be actionable, particularly if some of its words were taken out of context and used in such a way as to convey a false representation of fact . . . But in the context of this case, no such factual representation could reasonably be inferred . . ." *Letter Carriers*, 418 U.S. at 286.

those words in the context of the article as a whole, considered the author's diction and took note of the circumstances surrounding publication. For example, the Court noted that the "general tenor" of the challenged publication (an article about statements given under oath at a public hearing) did not negate the impression that the author was literally accusing Milkovich of perjury. *Milkovich*, 497 U.S. at 21. The Court also examined the words themselves to determine whether the use of "figurative" or "hyperbolic language" would negate the impression that the writer was asserting a statement of objective fact. *Id.* The Court even considered the audience toward which the publication was directed, going out of its way to note that the 42,065 citizens of Maple Heights, the city in which the reported incident occurred, would not "view statements such as these differently from people in a large city." *Milkovich*, 497 U.S. at 22. Thus, although the *Milkovich* Court emphasized the verifiability factor, it did not rely solely on that factor in reaching its conclusion that the challenged speech was actionable. Moreover, it certainly did not proscribe other courts from applying a multi-factor test that includes the verifiability component.

When we examine the Ninth Circuit's opinion in this case, it is immediately evident that the verifiability component was given careful consideration and considerable weight. (*See Hawaii Teamsters*, 302 F.3d 998.) Citing *Underwager v. Channel 9 Australia*, 69 F.3d at 366, the court stated: "[W]e must determine whether the statements at issue are provable as true or false." *Hawaii Teamsters*, 302 F.3d at 1008. The court then squarely addressed Steam Press's argument that "[the fact that] YLDC was not making money was proven true by [the Union's] own accountant, and Kahele knew it." *Id.* The court responded to this argument by pointing out that it assumed that the challenged statements were sufficiently unambiguous to be capable of a verifiable meaning. The court rejected that assumption holding that the challenged

statements were phrased in "abstract language" capable of any number of meanings. "Kahele's statements do not rest on a 'core of objective evidence,' *Underwager*, 69 F.3d at 367, and are simply not susceptible of being proved true or false. Thus, this factor, like the previous two, weighs in favor of construing Kahele's statements as opinion rather than fact." *Hawaii Teamsters*, 302 F.3d at 1009.

From the foregoing, it is clear that, even if the court had used only the verifiability factor in resolving the defamatory meaning question,[3] it would have reached the same conclusion: Kahele's statements were not defamatory. In light of the Ninth Circuit's attention to the verifiability component, Steam Press's assertion that the court reached its defamatory meaning conclusion on the sole basis of the statements' labor dispute context is a manifest distortion of the court's opinion.

Ironically, Steam Press's contention that the Ninth Circuit erred in considering the context of the challenged speech spells automatic defeat for its own position on the defamatory meaning issue. Interpreted in isolation, the words "Mike Drace is making money from the Steam Press" and even the words "Mike is hiding money in the Steam Press" do not have any tendency to injure the subject's reputation. The ability to "make money" from one's business is an admirable trait. And the act of hiding money cannot, in the absence of some nefarious circumstance, be construed as illegal, immoral, or otherwise objectionable behavior. If the challenged phrases can be said to be disparaging at all, they can only be so in context. When construed in the context of tense labor/management relations in which labor has asked that its benefits be restored and management has refused on the grounds that it has no money, the statements arguably cast

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[3] Here, the Union reemphasizes that the court was not obliged to employ such a test.

a hazy pall of suspicion over Mike Drace. But without the information provided by the context, the challenged speech is not even mildly insulting—much less defamatory. Simply put, if context is not a component of defamatory meaning, Steam Press's defamation claim would not have survived the pleading stage.

Before leaving the defamatory meaning issue, one more point must be made. Supreme Court cases like *New York Times v. Sullivan*, *Letter Carriers* and *Milkovich*—whose objective is to define the constitutional limits on the type of speech that may be subject to defamation actions—establish a baseline for first amendment protection. In other words, no statement may be deemed actionable defamation if it does not meet the threshold requirements set forth in these cases. However, states remain free to employ more stringent First Amendment protections for speech if they deem fit. *Mills v. Rogers*, 457 U.S. 291, 300, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982) (recognizing that "the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution."). Thus, even if Steam Press were correct in saying that the *Milkovich* court resolved the defamatory meaning question with a one factor test, the states and the federal circuits could nevertheless employ more complex tests that are more protective of speech, provided that they also meet the baseline requirement established in *Milkovich*. The "totality of the circumstances" test would (if Steam Press's interpretation of *Milkovich* were correct) be exactly such a test. It incorporates the verifiability component of *Milkovich* but also includes additional factors that make for a subtler analysis and greater protection for speech.

III. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE LAWS OF ANY CIRCUIT ON MATTERS OF LABOR POLICY

Steam Press endeavors to manufacture a "conflict" between the *Hawaii Teamsters* opinion and other federal opinions (in the 6th Circuit and elsewhere) by falsely stating that the opinion holds that "dishonesty 'enjoys the full protection of federal labor law.'" Petition at 21. It goes on to argue, desperately, that the opinion will undermine the very fabric of labor relations. Petition at 22-24. These arguments are little more than bombast. The most casual reading of the opinion reveals that the Ninth Circuit did not hold that all speech uttered in the labor arena is absolutely privileged. It simply held, reasonably, that non-defamatory speech in the labor context (like non-defamatory speech in any context) cannot give rise to defamation liability. The court never intimated that "the important social policies which underlie the law of defamation" are to be disregarded when defamatory speech occurs in the context of a labor dispute. It merely implied that the social policies underlying defamation law don't come into play if there is no defamation. Nothing in the opinion mandates—or even hints at—a change in mechanics of labor relations. No aspect of the opinion frustrates any aspect of "Federal Labor Policy," whether it be "union members' rights to meaningful participation in union affairs" or the union's "duty of fair representation." (See Petition at 21-23.) Federal labor policy was not even discussed in the defamation portion of the opinion. All that the opinion stands for as far as labor relations are concerned is that "Freedom of speech is an essential component of the labor management relationship. . . . federal law gives a union license to use intemperate abusive or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Hawaii Teamsters,* 302 F.3d at 1009. In making this pronouncement, the Ninth Circuit was not proposing the adoption of a radical

new principle of labor law but quoting from this court's landmark decision in *Letter Carriers*, 418 U.S. at 283.

Steam Press goes on to argue that the *Hawaii Teamsters* opinion conflicts with the Illinois Court of Appeal's decision in *Lowe Excavating Co. v. Int'l Union of Operating Engineers Local No. 150*, 765 N.E. 2d 21 (Ill. App. Ct. 2002). Nothing could be further from the truth. Preliminarily, it should be noted that the lions' share of the *Lowe* opinion was devoted to an analysis of the constitutional malice issue—an issue that the Ninth Circuit expressly declined to reach in the instant case. However, to the extent that the *Lowe* court addressed the issue of defamatory meaning, its approach was congruous with the method employed by the court in this case—particularly with respect to its reliance on context to determine defamatory meaning.

The *Lowe* court began its defamatory meaning analysis by distinguishing between defamation per se and defamation per quod, and determining that the challenged speech did not qualify as the former: "Here, the harmful nature of the Union's statements was not obvious but required knowledge of an extrinsic fact, that is, that the Ballashire Hall project was federally funded. Therefore, the Union's statements do not fall under the defamation per se classification." *Lowe* at 721. The court then went on to find that the statements could be interpreted as defamatory if the reader were aware of the labor relations context in which the statements were published: "Certainly if one knew, as FAMCO's Brei did, that the federally funded Ballashire Hall project required *Lowe*, by law, to pay prevailing wages and benefits, the Union's statements would be harmful to Lowe's reputation." *Id.* at 722. The *Lowe* court could not have made it more evident that it deemed context highly relevant to the defamatory meaning issue, just as the Ninth Circuit did in the instant case. Surprisingly, what is missing from the *Lowe* court's defamatory meaning analysis is the one factor that

Steam Press heretofore insisted is the only one that matters: The statements' susceptibility to being proven true of false. Given that the *Lowe* decision advocates a consideration of context to determine defamatory meaning, how does it "conflict" with *Hawaii Teamsters* on that point? And since it does not include a discussion of the verifiability component of the defamatory meaning analysis, how does it support Steam Press's central thesis? The answer to both questions is simply that it does not.

The remaining "conflict" arguments advanced by Steam Press in the final pages of its petition are so off the mark legally and so devoid of support in the record that they seem to have been made in connection with another case entirely. Many of the cases cited therein do not even involve defamation questions. None of them suggests that the Ninth Circuit's opinion raises important federal questions, involves the interpretation of federal statute or creates a conflict with another circuit or state supreme court.

Steam Press's argument that the Ninth Circuit's opinion creates an "absolute privilege" for defamation in the labor arena has been addressed repeatedly, *supra*. No purpose would be served by refuting that argument again here.

Certainly, in the universe of federal labor law, there are questions suitable for Supreme Court resolution. But the instant *defamation* opinion—which does not hinge on any federal law except the first amendment of the United States Constitution—does not give rise to any of them

CONCLUSION

For all of the foregoing reasons, Hawaii Teamsters & Allied Workers Union Local, 996 and Mel Kahele respectfully submit that the instant petition be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

STEAM PRESS HOLDINGS, INC., DBA YOUNG LAUNDRY AND DRY CLEANING, AND MICHAEL DRACE,
Petitioners,

v.

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996, MEL KAHELE, AS AN INDIVIDUAL, DOE DEFENDANTS 1-150,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Chief Justice Rehnquist's opinion in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) provides a scholarly review of defamation from its 16th century common law origins through this Court's long line of cases balancing the defamed's rights to a remedy against the speaker's First Amendment rights. The Court then rejected new limits on defamation actions via a mandatory "opinion v. fact" analysis holding "[w]e are not persuaded that, in addition to these protections, an additional separate constitutional privilege for 'opinion' is required". Id. at 21. It said "the breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine[.]" Id. at 19 (internal citations, brackets and quotation marks omitted). The Court then emphasized the countervailing interests of the defamed party as follows:

> [T]here is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). Justice Stewart in that case put it with his customary clarity:
>
> > "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty.

* * *

> "The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored." Id., at 92-93, 86 S.Ct., at 679-680 (concurring opinion).

We believe our decision in the present case holds the balance true.

Milkovich, 497 U.S. at 22-23.

In the instant case – notwithstanding the Union's contrary characterizations – the Ninth Circuit has expanded a limited protection into an absolute privilege for defamation in labor settings contrary to this Court's carefully established balance. And while paying lip service to the defamation standards set out by this Court in Milkovich, Linn v. United Plant Guard Workers, Local 114, 383 U.S. 53 (1966) and other cases, the Ninth Circuit misapplied or ignored them, disregarding the trial court's findings of the factual verifiability of the defamatory statements and malice which were supported by substantial and unrefuted evidence in the record, and replaced them with its own unsupported speculation[1] as to what the Union's defamatory statements "may" or "could have" meant. This expansion of privilege

[1] To support its holding that Kahele's statements were not defamatory, the Ninth Circuit speculated, without reference to any supporting testimony or evidence, what Kahele's defamatory statements "may have been intended to communicate" or what they "could have been a way of demanding" or what he "may have been saying[.]" Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, 302 F.3d 998, 1007 (9th Cir. 2002) (emphases added).

and departure from well-established defamation standards merits this Court's review.

I. The Ninth Circuit's Decision Significantly And Repeatedly Departs From Established Defamation Standards

While the Ninth Circuit's decision cites circuit precedent and discusses their holdings, it completely disregards the District Court's factual findings showing the true context of the defamatory statements and applies the "totality of the circumstances test" instead of the "reasonable factfinder" analysis adopted in Milkovich, and ultimately ignores this Court's repeated holding that "malicious libel enjoys no constitutional protection in any context[,]" not even labor disputes. Linn, 383 U.S. at 63.

The defamation here is set in the labor context of negotiations for a new contract which Union insisted must significantly increase financial benefits. Drace explained to Kahele that YLDC was having serious financial difficulties and could not afford an increase in wages and benefits for union members. (App. 50a ¶ 27, 53a ¶¶ 37 – 38)[2]. Kahele summarily rejected that information, refusing to believe Drace or review YLDC's financial records, and falsely told Union members their employer was making millions and hiding it away, (App. 72a ¶ 124), clearly implying Drace and YLDC were not only lying to their employees but were defrauding them too. When contract negotiations came to an impasse, largely because Kahele refused to believe Drace, both sides agreed that Union's own CPA would examine YLDC's books to determine whether Drace was telling the truth about

[2] "App." Refers to the appendix to Petitioners' Petition for Writ of Certiorari followed by "X" page numbers; reference to Petitioners'Excerpts of Record before the court below is to "PER" followed by "X" page numbers.

YLDC's financial status. (App. 61a ¶ 75). After reviewing the books, Union's CPA plainly told Kahele YLDC was financially strapped and did not have money. (App. 62a – 63a ¶¶ 78 – 84). Kahele wilfully disregarded those facts and again falsely told Union members – who presumably knew YLDC had rejected their demands saying it just didn't have the money – their employer was making and hiding millions of dollars.

A proper analysis of context shows Kahele's statements to Union members on September 11, 1998 and again on September 29, 1998, that YLDC and Drace were "making money" and "hiding money," in the range of "$7 to $10 million" (App. 72a ¶ 124, 74a – 75a ¶ 129, 82a ¶ 149), were not only believable, but were undisputedly believed, as the District Court found. (App. 83a ¶ 152, 84a ¶ 153). Union member Hannah Kilakalua testified without contradiction that YLDC employees believed Kahele's statements. (App. 70a – 71a, ¶ 120). Upon hearing Kahele's statements, YLDC employees demonstrated their belief by responding "Oh, that sucking Mike," and that Drace was a "son of a bitch" (App. 71a – 72a ¶ 122) (PER0247-48) and thereafter viewing Drace with distrust. The Ninth Circuit even acknowledged witness Kilakalua's testimony that she believed Kahele's defamatory statements. See Steam Press, 302 F.3d at 1008.

The Ninth Circuit, however, ignored the true context, ignored the uncontested testimony and findings that YLDC's employees did believe Kahele, and with no supporting evidence concluded Kahele's false statements were actually just "a call to arms, not assertions of objective fact" simply because the "[u]nion meetings at which Kahele made his statements were 'circumstances in which an audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric, or hyperbole.'" Id.

at 1007, 1009 (citation omitted). This departure from the well-established standard for analyzing defamatory meaning of statements in a labor negotiation setting merits review.

A. Milkovich's "Reasonable Factfinder" And "Core Of Objective Evidence" Tests Replace The Totality Of The Circumstances Test

In Milkovich, this Court reversed the Ohio Supreme Court's decision based on the "totality of circumstances" test or multifactor analysis, 497 U.S. at 8-9, and instead adopted the "reasonable factfinder" analysis to determine, on a core of objective evidence, whether (1) a reasonable factfinder can conclude that the statements imply an assertion of objective fact rather than hyperbole and (2) the statements are sufficiently factual to be susceptible of being proved true or false. See id. at 21. Applying this analysis, the Court said a reasonable factfinder could conclude that the caption[3] and text of the subject article "imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding." Id. Indeed, the mere connotation that Milkovich committed perjury was sufficiently factual to be susceptible of being proved true or false.

In Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), the Ninth Circuit properly applied Milkovich to hold "the threshold question in defamation suits is not [as Union here contends] whether a statement might be labeled 'opinion,' but rather whether a reasonable factfinder could conclude that the statement impl[ies] an assertion of objective fact." Id. at 1053. (quoting Milkovich, 497 U.S. at 18)

[3] The article bore the heading "Maple beat the law with the 'big lie,'" and contained the following passages: "A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out." Milkovich, 497 U.S. at 4 (internal quotation marks omitted).

(internal quotation marks omitted). The Ninth Circuit concluded that T.V. newscaster Andy Rooney's statement that Unelko's product "Didn't Work" was an assertion of fact, not loose figurative or hyperbolic language, notwithstanding the humorous and satirical tenor of the Rooney broadcast, and that the statement was sufficiently factual to be susceptible of being proved true or false. See Unelko, 912 F.2d at 1053-55.

While the Ninth Circuit acknowledged here that Kahele's statements "employ plain unadorned language" and are not "the type of language that courts of this circuit have previously found to be loose and figurative", Steam Press, 302 F.3d at 1007, it discarded the Milkovich "reasonable factfinder" and "core of objective evidence" standard to hold that a labor context trumps clearly provable defamatory content.

B. The Ninth Circuit Decision Overrules This Court's Limitation On Defamation Privilege In A Labor Setting

"[T]he Bresler-Letter Carriers-Falwell line of cases [only] provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." Milkovich, 497 U.S. at 20 (emphasis added). Put another way, there is no protection for defamatory statements that can reasonably be interpreted as stating actual facts about an individual.

Here again the Ninth Circuit has ignored or rewritten that standard. Disregarding the fact that Kahele's statements could be reasonably interpreted as stating actual facts about an individual, and thus were not within the purview of the protection, and disregarding the evidence and the context of the defamation, the Ninth Circuit crafted alternative interpretations of Kahele's remarks, then used those interpretations to conclude the protection applied. The Ninth

Circuit has expanded a specific, carefully crafted exception to engulf and effectively eliminate defamation as a cause of action in a labor setting, granting unions license to say anything despite knowing, as Kahele did, that their statements are undeniably and knowingly false. That was clearly not this Court's intent.

C. Context Is Only Considered In The Determination Of Whether A Statement Is Factual

Respondent incorrectly argues that Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970), Letter Carriers v. Austin, 418 U.S. 264 (1974) and Hustler Magazine v. Falwell, 485 U.S. 46 (1988) hold that context always trumps defamatory content. These cases considered context as one factor in determining whether a statement contained an assertion of fact. In these three cases, context showed no reasonable finder of fact could believe that a developer was actually a blackmailer, Greenbelt, 398 U.S. at 14, a parody of a public figure was true, Hustler Magazine, 485 U.S. at 57, or a union member was actually a traitor, Letter Carriers, 418 U.S. at 283-84. No fact existed, ergo, no defamatory statement existed. In contrast, the context in this case mandates belief, not disbelief or ambiguity. Made in the midst of contract negotiations where the employer's financial status was the central issue, Kahele's statements were a scathing factual indictment of fraud and deceit which the employees heard, understood and clearly believed, destroying the good reputations of Drace and YLDC and damaging the business as well.

D. Defamatory Statements Are Not Immunized Just Because They Are Made In The Broad Context Of A Labor Controversy.

In Linn, this Court stated that epithets such as "scab," "unfair" and "liar" were not immunized just because they

were made in the course of a labor controversy. Linn, 383 U.S. at 60-63. False statements made with malice, which cause injury, are not protected by either the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, et. seq. or by the First Amendment. Linn, 383 U.S. at 64-65; see also Letter Carriers, 418 U.S. at 272-73; San Antonio Community Hosp. v. Southern Cal. Dist. Council of Carpenters, 125 F.3d 1230, 1235 (9th Cir. 1997). No party to labor negotiations enjoys a "license to injure the other intentionally by circulating defamatory or insulting material known to be false." Letter Carriers, 418 U.S. at 272 (quoting Linn, 383 U.S. at 61).

Balancing federal labor law goals with a state's local interest in protecting the reputations of its citizens and businesses, this Court acknowledged that while the NLRA manifests an intent to encourage robust debate on issues dividing labor and management, "malicious libel enjoys no constitutional protection in any context." Linn, 383 U.S. at 63 (emphasis added). "After all, the labor movement has grown up and must assume ordinary responsibilities. The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses." Id. (emphasis added).

Accordingly, Kahele's malicious lies enjoy no constitutional protection in any context, Linn, 383 U.S. at 63 (emphasis added), and the Ninth Circuit's decision directly conflicts with this Court's decision in Linn, notwithstanding Union's argument to the contrary.

E. Protection For Defamation During Organizing Campaigns Should Not Extend To Union Representation And Contract Negotiations

This case presents what appears to be a question of first impression: Do the protections granted unions in organizing campaigns extend to normal representation and

contract negotiations? Both Linn and Letters Carriers involved defamation during organizing campaigns;[4] a campaign leaflet in Linn and a union "organizational drive" newsletter in Letter Carriers. Letter Carriers, 418 U.S. at 266. While acknowledging the liberal standard applied to organizational campaign rhetoric,[5] the Court said even that is not without limits. The Court held that libel actions under state law are not preempted by the federal labor laws for publication of defamatory statements in labor disputes which are knowingly false or made with reckless disregard for the truth. See Letter Carriers, 418 U.S. at 272-73.

The significant, albeit not absolute, protection was tailored to the unique context of an organizing campaign, during which union organizers have virtually unlimited license to entice employees. However, once employees join the union, their relationship with union officials is much different, and protection afforded a defamatory statement during the organizing process is no longer in balance with protections against defamation. Once employees are organized, the union becomes their exclusive representative in dealings with their employer, and the union and its officials then have a fiduciary

[4] Letter Carriers, 418 U.S. at 267, 269, 276.

[5] "Vigorous exercise of this right 'to persuade other employees to join' must not be stifled by the threat of liability for the over enthusiastic use of rhetoric or the innocent mistake of fact." Letter Carriers, 418 U.S. at 277. The degree of permissiveness was further illustrated by a NLRB Regional Administrator who said:

> It is a cliché by now but, nonetheless, an embedded policy in labor relations that electioneering or campaigning has a broad tolerance. We do not encourage, nor do we prohibit, the exaggeration, the dissemination of half-truth or accusation. In sum, we leave it up to the employee to decide.

Id. at 275 (footnote omitted).

duty not only to represent its members, but to deal with them truthfully.

Kahele's defamatory remarks were not made in the heat of an organizational campaign, but more than a decade later during contract renegotiations. Petitioners submit that defamation and preemption in these two very different and frequently recurring contexts merit this Court's review and instruction.

II. Federal Labor Policy Is Harmed When Unions Can Lie To Their Members

The Ninth Circuit's decision not only assumes labor leaders lie to their unit members and that unit members know that and expect to be lied to, but it condones and protects the practice even where defamatory. Allowing unions to lie to its members to foment a strike affects important federal labor policies. As this Court stated in Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 75 (1991), a "union owes employees a duty to represent them adequately as well as honestly and in good faith." When members cannot believe their union, this duty is violated, resulting in distrust between a union and its members that denies members the right to meaningfully participate in union affairs and to understand and protect there own interests.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in Petitioners' opening brief, YLDC and Michael Drace, respectfully request that the instant petition be granted.

Respectfully submitted,

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